In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

INDEX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RELEVANT DOCKET ENTRIES

UNITED STATES OF AMERICA
v.
CECIL J. BISHOP, DEFENDANT

No. 14897
Cr-70-218

26 USC 7206(1)—Willfully subscribing and making false returns.
3—counts

4/22/70 Filed Order for Transfer, from Northern District of California, San Francisco, Calif.
Filed Summons on Return Executed.
Filed Indictment.
Motion for Transfer Case to U.S. District Court for the Eastern District of California.
Filed Affidavit In Support of Defendant's Motion to Transfer Case.

5/1/70 Reg. this date for arraignment. No appearance for deft. William B. Shubb, Esq., present for Gov't and on his motion ordered summons Issued, via mail service. (TJM)

5/4/70 Issued Summons. Address: Suite 408, 1007—7th St., Sacto, Calif., Returnable May 12, 1970.

5/12/70 Reg. this date for arraignment. Deft present with Counsel C. Richard Johnston, Esq., William B. Shubb Esq., AUSA present for the U.S., Deft arraigned, Stated his true name as charged, Counsel waived reading of Indictment and deft. entered a plea of NOT GUILTY TO EACH CHARGE, TRIAL BY JURY WAS DEMANDED AND Case set down for jury for August 17th, 1970 at 10:00 A.M. Counsel for the deft allowed 30 days from this date to make pre-trial motions in connection with this matter. Deft released on his OR. (TJM)

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12/21/70 Reg. for fur. trial, court instructed jurors, and jurors retired at 10:45 AM for deliberation. Ord. U.S. Marshal furnish lunch to jurors, the jurors returned into court at 4:30 PM and rendered the following verdict:

"We, the jury, find Cecil J. Bishop, the defendant at the bar, Guilty as to Count 1, Guilty as to Count 2, Guilty as to Count 3. /s/ Rex Knoles, Foreman."

The jurors were polled & all members confirmed their vote, whereupon the jurors were dismissed. Ord. case referred to the probation office for pre-sentence investigation & report & case cont'd to Jan. 7, 1971 for judgment. O. R. (TJM)

Filed verdict

* * * * *

2/11/71 Reg. this date for judgment on 3 Counts. Deft present with counsel J. Richard Johnston, Esq., John Kilgariff, Esq., AUSA., Probation Officer present. After hearing all parties at some length, Ordered deft imprisoned for a period of Two (2) years as to each count and such sentence to run concurrently with each other, The first 90 day (sic) of each sentence to be spent in a jail type institution and these sentences also to run concurrently with each other. Remainder of each sentence suspended and deft placed on Probation for period of Five (5) Years, following jail term, which is to be served during Forty-Five 48-hour weekends. As a Condition of probation deft is ordered to pay a fine in the sum of Five Thousand ($5,000) within Six (6) Months after implementation of sentence. Execution of sentence Ordered stayed pending outcome of appeal. Notice of which filed this date. Deft released on OR. (TJM)

Filed NOTICE OF APPEAL

2/16/71 Filed Judgment and Commitment (Entered February 16th, 1971).

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6/16/71 Mailed Record to Ninth Circuit Court of Appeals.

JAMES L. BROWNING, JR.
United States Attorney
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, v. CECIL J. BISHOP, DEFENDANT.	Criminal No. Violation: Title 26 U.S.C. Section 7206 (1) - Willfully Subscribing and Making False Returns.

INDICTMENT

FIRST COUNT: (Title 26 U.S.C. Section 7206(1))

The Grand Jury charges: THAT

On or about April 15, 1964, in the Northern District of California,

CECIL J. BISHOP

defendant herein, did willfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1963, in his name which was verified by the defendant by a written declaration that it was made under the penalty of perjury, which said income tax return for the calendar year 1963 the defendant did not believe to be true and correct as to

every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $45,654.44 in the year 1963, whereas as he then and there well knew, he had in truth and in fact overstated the amounts of said farm expenses to the extent of $20,923.87.

SECOND COUNT: (Title 26 U.S.C. Section 7206(1))

The Grand Jury further charges: T H A T

On or about April 14, 1965, in the Northern District of California,

CECIL J. BISHOP

defendant herein, did willfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1964, in his name, which was verified by the defendant by a written declaration that it was made under the penalty of perjury which said income tax return for the calendar year 1964 the defendant did not believe to be true and correct as to every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $44,360.50 in the year 1964, whereas, as he then and there well knew, he had in truth and in fact overstated the amounts of said farm expenses to the extent of $17,021.70.

THIRD COUNT: (Title 26 U.S.C. Section 7206(1))

The Grand Jury further charges: T H A T

On or about April 14, 1966, in the Northern District of California,

CECIL J. BISHOP

defendant herein, did willfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1965, in his name, which was verified by the defendant by a written declaration that it was made under the penalty of perjury, which said income tax return for the calendar year 1965 the defendant did not believe to be true and correct as to every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $42,111.74 in the year 1965, whereas, he then and there

well knew, he had in truth and in fact, overstated the amount of said farm expenses to the extent of $10,126.86.

A True Bill.
/s/ E. E. Posten
Foreman

/s/ James L. Browning, Jr.
JAMES L. BROWNING, JR.
United States Attorney
(Approved as to Form:
.....)

SACRAMENTO, CALIFORNIA, MONDAY, DECEMBER 21, 1970.

9:00 O'CLOCK A.M.

THE CLERK: Case Number 14897, United States versus Bishop.

THE COURT: Jury all present; defendant present with counsel.

Now, ladies and gentlemen of the jury:

You have heard the testimony of the witnesses, and you have heard the arguments of counsel. It is now my duty to instruct you as to the legal principles which enter the case.

You are the judges of the facts, and that includes the determination by you of the guilt or innocence of the defendant. Where the evidence is conflicting, it is your duty to resolve that conflict and determine what is the truth.

In the performance by you of your duty as judges of the facts, you may not act arbitrarily, as ours is a government of laws and not of men and you are governed by rules of law. It is my duty as judge of the Court to announce those rules of law to you, and it is your duty as jurors to apply the law. You must base your determination of what the facts are upon the evidence introduced at the trial and upon the evidence alone.

Now, sometimes when the use of a pronoun is appropriate in an instruction, the masculine only will be used as a convenience in composition although the instruction may refer and apply to a defendant, or a witness, or another person who, in the case on trial, is a female person. Whenever a masculine pronoun is used in these instructions, its reference embraces such a female person to the same effect as if the corresponding female pronoun were substituted.

Now, in these instructions I in no manner or form intend or desire you to understand that I am expressing any opinion as to the guilt or innocence of the defendant, or upon the weight of any evidence, or as to the truth or falsity of any statements or any witnesses in the case, or as to any inference that you should draw from any of the testimony, or as to whether any alleged fact is or is not proven.

If the Court has at any time during the trial asked any

questions, made any ruling, and used any language or done anything which seemed to you to indicate the opinion of the Court as to any question of fact, you must not be influenced thereby, but must determine for yourselves all questions of fact, without regard to any opinion you may suppose the Court may have or entertain. The question of the guilt or the innocence of the defendant is for you alone, regardless of what the Court or anybody else may think about it.

To state the matter in another way, let me say that I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to whether witnesses are, or are not, worthy of belief; what facts are, and are not, established; what inferences should be drawn from the evidence; or any opinion concerning the guilt or innocence of the defendant. If any statement, expression or act of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Now, there are certain rules that apply to all criminal cases. I shall now give them to you to aid in determining the weight of the evidence in this case, and how you should adjudge the evidence that has been presented to you for your consideration.

The function of the jury is to try the issues of fact that are presented by the allegations in the indictment filed in this court and the defendant's plea of not guilty. This duty you must perform uninfluenced by pity for the defendant or by passion or prejudice against him. Additionally, the law forbids you to be governed by suspicion or by sentiment, conjecture, sympathy public opinion or public feeling. You must not suffer yourselves to be biased against a defendant because of the fact that he has been arrested or because an indictment has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or speculate from any or all of them that he is more likely to be guilty or innocent.

Suspicious circumstances are not in themselves sufficient to convict the defendant; rather the prosecution must prove the defendant's guilt to a moral certainty and beyond a reasonable doubt. If, after considering all the evidence in the case, you find that there are more than suspicions,

even though strong suspicions, as to the guilt of the defendant, or that the evidence only creates suspicious circumstances pointing to his guilt, you must return a verdict finding the defendant not guilty.

The indictment, as I have just stated previously, is but a formal method of accusing the defendant of a crime. It is not evidence of any kind against the accused and does not create any presumption or permit any inference of guilt.

Now, both the Government and the defendant have a right to demand, and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a verdict, regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. While you can consider only the evidence in the case in reaching your verdict, you are not limited to the bald statements of the witnesses in the consideration of their testimony. On the contrary, you are permitted to draw from the facts, which you find have been proven, such inferences as seem justified in the light of your own experiences. An inference is a deduction or conclusion which reason and common sense leads one to draw from facts which have been proven.

A presumption is a conclusion which the law requires the jury to make from particular facts. Unless declared by law to be conclusive a presumption may be overcome or rebutted by direct or indirect evidence which is contrary to the fact presumed. Unless a presumption is so overcome or rebutted, the jury is bound to find in accordance with the presumption.

Now, it is the duty of the attorneys on each side of the case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it, or speculate as to what the witness would have said if permitted to answer.

Likewise, if any evidence was stricken from the record by the Court or refused admission by the Court, it must be entirely disregarded by you and you must treat such evidence as if you had never heard it or seen it, and if any counsel intimated by any of his questions that certain hinted facts were or were not true, you must disregard any such intimations and you must not draw any inference from it.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Now, the attorneys have discussed the law during the course of their respective arguments. They had a perfect right to do this. I would caution you, however, that you must look to these instructions and nowhere else for the law that will guide you in your deliberations in this trial. If the attorneys, or anyone else, have suggested, or if any of you believe that the law is other than it is given to you in these instructions, I charge you that you must be guided by the rules of law given to you in these instructions to the complete exclusion of any other suggested, or otherwise apparent rules of law.

Now, a criminal—strike that.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This simply means that the burden of proving the guilt of the defendant rests upon the prosecution; that is, upon the Government of the United States in this instance, and that burden includes the proof beyond a reasonable doubt of every element of the offense necessary to be proven. Unless and until outweighed by evidence in the case to the contrary, the law presumes, as I have just stated, that a person is innocent of crime or wrong; that official duty has been regularly performed; that private transactions have been fair and regular, that the ordinary course of business or employment have been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and the law has been obeyed.

A defendant is not required to prove himself innocent nor to put in any evidence at all upon the subject of his innocence. In considering the testimony of the case you must look at that testimony and view it in light of the presumption with which the law clothes the defendant; namely, that he is innocent. It is a presumption that abides with the defendant throughout the trial of this case unless the evidence convinces you to the contrary beyond a reasonable doubt.

The presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of his guilt from all the evidence in the case.

There are certain standards that you can take into account in weighing the evidence of the case. As I have previously stated, one of the basic principles is that you cannot bring in a verdict of guilty unless you are convinced beyond a reasonable doubt of the guilt of the defendant.

I will define for you the term "reasonable doubt." It is precisely what the term implies. It is a doubt based upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt which is perhaps imaginary or fanciful, or one that is perhaps capricious or speculative. It simply means an honest doubt that appeals to reason and is founded upon reason. If in this case, after you have considered the evidence, you have such a doubt in mind as would cause you or any other prudent man or woman to hesitate in some matter of grave concern in your own minds, then you have a doubt as the law contemplates as a reasonable doubt.

While a defendant cannot be convicted unless his guilt of the crime charged is established to a moral certainty and beyond a reasonable doubt, the law does not require a demonstration; that is, such a degree of proof, as excluding the possibility of error, produces absolute certainty, because such proof is rarely, if at all, possible. Moral certainty alone is required; that is, that degree of proof which produces conviction in an unprejudiced mind.

Now, as I previously stated, you are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified,

and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider such witnesse's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Stated another way, whether or not you believe the witnesses who have testified in the case and the weight that is to be attached to the testimony given by them, as I have stated previously, is a matter for your exclusive judgment. In this case, as in all cases, we start out with a presumption that every witness speaks the truth. We presume when a witness allows himself to be sworn to tell the truth that in fact he came here to tell the truth. However, this presumption may be repelled in several ways. Among the ways that it may be repelled are:

The manner in which the witness testifies;

His demeanor on the witness stand;

By the character of his testimony;

By his bias or prejudice, if any, for or against one or any of the parties;

By contradictory evidence, or by contradictory statements;

By his motives;

By evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony;

By evidence that he knowingly testified falsely concerning any material matter;

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness in whatever manner is for you to determine.

In passing on the credibility of the various witnesses who have testified here on the witness stand, you may accept all or any part of the testimony or you may disregard or reject all or any part of the testimony of any witness.

For instance, if it has been demonstrated to you during the trial of the case that any witness has wilfully testified falsely as to a material point, it is your right to reject all of that witness's testimony, to distrust, and not to consider it unless you shall be convinced from the evidence that the witness has in other particulars told the truth.

You are not to be swayed by the fact that there may be a larger number of witnesses on one side of the case than on the other. It is not the number of witnesses that determines the weight of the evidence, but it is the credibility of the witnesses who testify that is the deciding factor in determining the amount of weight you should attach to the testimony.

Now, you are instructed that neither the Government nor the defendant is bound by the testimony of witnesses which it calls to the stand in a criminal case.

Either the Government or the defendant may offer part of what a witness says as the truth and contend against a part that it does not consider true. Similarly, you members of the jury may accept a part of what the witness says, and you may reject another part of what a witness says.

I refer to the demeanor of the witness on the witness stand. By demeanor is meant such things as whether a witness appeared to be hostile, reluctant, evasive, obtuse, timid or deceitful; or on the contrary, appeared to be impartial, straightforward, unconcealing, intelligent, confident, or guileless.

Conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge,

may be considered by the jury in the light of other evidence in the case, in determining the guilt or innocence of the accused.

When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance if any to be attached to any such evidence, are matters for determination by you, the jury.

Now, the defendant has testified in this case. In so doing, he has become a witness in the case and as such must be treated according to the same standards that apply to the testimony of any other witness.

There are two classes of evidence recognized and received in the courts upon either of which—what is the problem, Mr. Nevis?

THE CLERK: I am shy a marshal.

THE COURT: We will wait until one shows up, Mr. Nevis.

THE CLERK: I can stand at the door.

THE COURT: Will you please?

There are two classes of evidence recognized and received in the courts upon either of which, or a combination of which, a defendant may be convicted of a crime. One is direct evidence—the testimony of an eyewitness as to what he or she has seen or heard. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case regardless of whether it is direct evidence or circumstantial evidence or a combination of both.

Now, if the evidence in this case is susceptible to two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt

of the defendant and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of his innocence, and reject that which points to his guilt.

Now, you will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to the defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilty; namely that you shall be convinced of such guilt beyond a reasonable doubt.

The Court cautions you to distinguish carefully between facts testified to by the witnesses and the statements made by the attorney in their arguments, or presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict, consider only the facts testified to by the witnesses; you will remember at all times that statements of counsel in their argument or presentations are not evidence in the case. And if counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

Now, in this case you have heard the testimony of a person called as an expert witness based upon his analysis of certain records which have been introduced in evidence. This class of testimony is proper and competent evidence concerning matters involving knowledge, skill or experience in a subject which is not within the realm of ordinary experience of mankind and which requires special training or study to understand.

The law allows those skilled in special fields to express opinions and to say whether or not, according to their knowledge and experience, a fact may or may not exist.

Nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound by the

testimony of experts, and the testimony of such experts is to be considered and weighed as that of any other witness.

Just so far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called as an expert, and gives opinions upon a particular point, does not necessarily obligate the jury to accept his opinions as to what the facts are.

The testimony of an accountant and any summaries or charts prepared by him and admitted into evidence are competent for the purpose of explaining facts disclosed by books, records, and other documents which are in evidence. However, such charts or summaries are not in and of themselves evidence or proof of any facts. So if you should find that such charts or summaries do not reflect facts and figures shown by the books, records, documents and other evidence in the case, you must disregard them.

That is to say, such charts or summaries are used only as a matter of convenience, and unless you find that they are in truth summaries of facts and figures shown by the evidence in this case, you are to disregard them entirely.

In every criminal case the Government must first establish the fact that a crime has been committed. This is known as the corpus delicti in the law.

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

The crime charged in this case requires proof of specific intent before a defendant can be convicted.

Specific intent, as the term itself suggests, requires more than a mere general intent to engage in a certain conduct.

A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent.

An act or failure to act is done knowingly if done voluntarily and purposely and not because of mistake or inadvertance or other innocent reason.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can

be no eyewitness account of the state of mind with which the acts were done or omitted.

But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

In determining the issue of intent—strike that.

In determining the issue as to intent, the jury are entitled to consider any statement made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

Now, the indictment, as you have been previously informed, is in three counts or charges.

The first count charges that: On or about April 15, 1964, in the Northern District of California, Cecil J. Bishop, defendant herein, did wilfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue at San Francisco, California, an individual income tax return for the calendar year 1963, in which his language was verified by the defendant by written declaration that it was made under the penalties of perjury, which said income tax return for the calendar year 1963 the defendant did not believe to be true and correct as to every material matter in that the defendant claimed certain deductions for farm expenses in the amount of $45,654.44 in the year 1963, whereas he then and there well knew, he had in truth and in fact overstated the amounts of said farm expenses to the extent of $20,923.87.

In violation of Section 7206(1), Internal Revenue Code of 1954; Section 7206(1), Title 26, United States Code.

Now, the second and third counts of the indictment make the same charge except that they relate to the calendar years 1964 and 1965, respectively, and the amounts of the overstatements of farm expense deductions and the pertinent dates are different.

Now, to the charges contained in the indictment that I

have just referred to, the defendant has entered a plea of not guilty and that puts in issue every material allegation contained in the indictment.

Now, the offenses charged in the indictment are based on alleged violations of a statute enacted by Congress, namely Section 7206(1) of the Internal Revenue Code of 1954; this statute provides in part as follows:

"Any person who wilfully makes and subscribes any return which contains or is verified by written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of an offense."

The gist of each offense charged in the indictment is the wilful making and subscribing by the defendant of a return containing or verified by a written declaration that it is made under the penalties of perjury and which the defendant did not believe to be true and correct as to every material matter. To prove its case, the Government must establish the following three elements:

One, a wilful making and subscribing of a return incorrect as to a material matter;

Two, the return must contain the written declaration that it is made under the penalty of perjury;

Three, the maker must not believe the return to be true and correct as to every material matter.

In the first count of the indictment, the defendant is charged with intentionally overstating the deductions he claimed for farm expenses in his 1963 income tax return to the extent of $20,923.87. This amount consists of the following items:

(A) All checks issued by the defendant to Louise Bishop which are listed under the heading "farm" in a schedule attached to the defendant's 1963 income tax return, totaling $16,423.87.

(B) Payments to Bank of America, $4,500.

Total: $20,923.87.

For the purpose of this proceeding, the Government does not claim that any deductions were overstated in the defendant's 1963 return, and I instruct you that in determining the defendant's guilt or innocence on the first count, you are not to concern yourselves with any other deductions claimed in the return except those which may be duplicative of the above.

In the second count of the indictment, the defendant is charged with intentionally overstating the deductions he claimed for farm expenses in his 1964 income tax return to the extent of $17,021.70. This amount consists of the following items:

(A) Payments to Louise Bishop on January 27th, 1964, $5,500.

(B) Payments to Louise Bishop which the Government alleges she used to pay for swimming pool upkeep, flowers and plants, extra groceries for the defendant's weekend guests and other non-business expenses in the total amount of $6,521.70.

(C) Principal portion of a $5,038.82 payment to the Bank of America on November 6, 1964, $5,000.

I should state that a little better than it is stated, in other words, it's principal portion of the $5,038.82 payment to the Bank of America on November 6, 1964, the principal payment being $5,000. So those three items together total $17,021.70.

Now, for the purpose of this proceeding, the Government does not claim that any other deductions were overstated in the defendant's 1964 return, and I instruct you that in determining the defendant's guilt or innocence on the second count, you are not to concern yourself with any other deductions claimed in the return.

Now, in the third count of the indictment, the defendant is charged with intentionally overstating the deductions he claimed for farm expenses in his 1965 income tax return to the extent of $10,126.86. This amount consists of the following items:

Amount paid Louise Bishop by Cecil Bishop, $18,331.48.

Less farm expenses actually accounted for by Louise, $13,513.52.

So the difference in the way of non-deductible farm expenses for that year claimed by the Government is $4,817.96. I am going to let you take this particular instruction into the jury room with you. Otherwise, I cannot expect you to remember these figures. So I am going to allow you to take this instruction in with you.

The difference there, then, is $4,817.96.

And the next item is:

Payment to Crocker Citizens Bank on Louise Bishop's loan, $864.

Monies paid to Robert Bishop for his living expenses and education, $2,212.50.

Principal payments to Bank of America on loan to Cecil, $4,882.40.

For a subtotal of $12,776.86.

Less salary paid Louise and not claimed in return, $2,650, for a total net claimed alleged overstatement on the part of the Government claimed against the defendant of $10,126.86.

Now, for the purposes of this proceeding, the Government does not claim that any other deductions were overstated in the defendant's 1965 return, and I instruct you that in determining the defendant's guilt or innocence on the third count, you are not to concern yourselves with any other deductions claimed in the return.

Now, it is not necessary for the Government to prove that the exact amount of the overstatements of farm expense deductions were exactly the amounts charged in the indictment. The precise amounts of the overstatements are not the gist of the offense and the Government is not held to prove exact figures. To find the defendant guilty, you must find that he wilfully and knowingly subscribed or signed his name to his income tax return or returns under the penalties of perjury, knowing that he had overstated a substantial amount of his farm expenses deduction in his income tax return or returns, and what is a substantial amount under the circumstances of this case is a factual matter for the determination of you, the jury. Whether or not the Government has suffered a pecuniary or monetary loss as a result of the alleged false returns is not an element of the offenses as charged in the indictment.

The offense as charged in the indictment is complete when a person wilfully makes and subscribes a return, under the penalty of perjury, which he does not believe to be true and correct as to every material matter.

Now, in connection with the three counts of the indictment wherein the defendant is charged with subscribing under the penalties of perjury his 1963, 1964 and 1965 income tax return, respectively, it is your duty, members of the jury, to concern yourselves solely with the following questions of fact:

Whether the returns—and I realize I sound like I am repeating myself a great deal. But, nevertheless, when the judge and the lawyers—we know this. This is in our minds,

but we want to be sure you understand completely the function that you are to perform when you get in the jury room and the elements of the offense required to be proved in order to find this defendant guilty. So you listen carefully, again, to these specific requirements.

You are concerned with the following questions of fact:

(A) Whether the returns in question were made and subscribed or signed by the defendant.

(B) Whether the defendant, if he made and subscribed the returns, acted wilfully at the time of making and subscribing them.

(C) And whether the defendant, if he made and subscribed these returns, believed the alleged false statements to be true and correct as to every material matter.

Now, if you find that the defendant signed his individual income tax returns, you may consider that as a circumstance in determining whether he had knowledge of the contents of those returns. But the fact that he signed a return does not necessarily prove that he has knowledge of any particular item or amount set forth in the return.

Now, although the defendant is herein charged with overstating a substantial amount of his farm expense deductions on his income tax returns for the years 1963, 1964 and 1965, the Court, nevertheless, permitted evidence of deductions claimed for the years 1961 and 1962. Such evidence is to be considered by you only insofar as you find it bears upon or relates to the intent of the defendant, if you find that he overstated a substantial amount of his farm expense deductions on his income tax returns for the years involved in the indictment. In other words, such evidence was admitted for the purpose of showing or throwing light upon the state of mind or intent of the defendant when overstating a substantial amount of his farm expense deductions on his income tax returns.

It is not enough if all that is shown is that the defendant was stubborn, or stupid, or careless, or negligent. A defendant does not wilfully make a return which he does not believe to be true and correct as to every matter simply because he is careless or neglectful about keeping his records, or makes errors of law, or because he in good faith acts contrary to regulations laid down by the Treasury Department, or fails to seek the advice and assistance of a

lawyer or accountant. None of these attitudes or acts is a crime under the Internal Revenue law.

As I have previously stated, the question of intent is a matter for you, as jurors, to determine. And as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and the circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question.

Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

On the question of intent to make and subscribe a false return, you may consider certain facts as pointing to such intent, if you find that they exist in this case. These are illustrations: A consistent pattern of overstating farm expense deductions, a large disparity between reported and actual farm expense deductions, and a substantial disparity between a person's reportable taxable income and his standard of living if the latter cannot be satisfactorily reconciled with the person's reported taxable income and other available assets.

Under the Internal Revenue laws, an employer is entitled to deduct all of his ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. The amount that an employer may deduct as a compensation paid to an employee is not necessarily limited to the payments that he labels as "salary," but includes also the total amount actually paid to the employee as compensation for services, if those amounts are reasonable and are in fact payments purely for services.

If you find that Louise Bishop received from the defendant Cecil Bishop monies in addition to the amounts agreed upon by them as "salary," and if such monies were really compensation for her services in managing the defendant's

ranch and were reasonable in amount, you may conclude that the defendant was entitled to deduct such amounts on his income tax returns, and if not really compensation for her services in managing the ranch of the defendant or were not reasonable in amount, you may conclude that the defendant was not entitled to deduct such amounts on his income tax return.

In each of the counts in the indictment, the defendant is charged with overstating certain deductions for farm expense on his individual income tax returns. In determining whether they were false as to a material matter, you should consider whether or not the items alleged to be false were essential or useful to the Internal Revenue Service in ascertaining the corrections of the tax declared or in verifying or in auditing the returns of the taxpayer.

You are instructed that farm expenses are a material matter in the defendant's income tax returns for 1963, 1964 and 1965.

You will note that the acts charged in the indictment are alleged to have been knowingly.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of a mistake, inadvertance or other innocent reason.

With respect to offenses such as charged in this case, as I have previously stated, knowledge must be proved before there can be a conviction.

You will note that the acts charged in the indictment are alleged to have been done wilfully.

An act is done wilfully if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose either to disobey or to disregard the law.

There is a distinction between the civil tax liability of the defendant and his criminal liability. This is a criminal case and has nothing to do with the collection of taxes which the defendant may owe, if any. The question of whether he owes any taxes and, if so, how much, will not be determined by the outcome of this trial but rather is the subject of a separate type of proceeding, and you should give no thought to that matter in arriving at your decision in this case.

Now, the defendant has introduced evidence of his good reputation in his community prior to the indictment in this case. Such evidence may indicate to the jury that it is

improbable that a person of good character would commit the crime charged. Therefore, the jury should consider this evidence along with all the other evidence in the case in determining the guilt or the innocence of the defendant. The circumstances may be such that evidence of good character may alone create a reasonable doubt of the defendant's guilt, although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if the jury, after weighing all the evidence, including the evidence of good character, is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment.

Now, if you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of various witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such point of difference, affects the true issues in this case. Examine such discrepancies or inconsistencies and such disputed points, and ask yourself these questions: How does the decision of this, or that, or the other discrepancy or matter in dispute affect the guilt or the innocence of the defendant?

Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourself the main question: Did or did not the defendant commit the offense charged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant?

If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth or the guilt or the innocence of the defendant, then such discrepancies or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them.

Now, it is your duty as jurors, and as I have stated, to try this case as to the facts, upon the evidence introduced at the trial; and upon the law as given you by the Court in these instructions. The Court, however, has not attempted to embody all the law applicable to the case in any one of these instructions, but in considering any one instruction, you must construe it in the light of and in harmony with

every other instruction given, and so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial.

You must not consider the question of possible punishment of the defendant in this case. That subject is of no concern to you. To you is committed the sole question of determining the guilt or innocence of the defendant. It is exclusively in the province of the Court to determine what punishment, if any, is to be meted out and that question arises only if the jury finds the defendant guilty.

Now, I think I have now given you as briefly as possible for me to do the various rules and principles which are to govern you in your deliberations and in your determination of the factual questions which are yours for decision.

If you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room, and if, after you have fully discussed the case between you, you are satisfied that your original view was erroneous, I ask that you do not be stubborn, and in that situation do not hesitate to change your views. However, if, after a full exchange of views with your fellow jurors, you still feel that you are right, of course, you should maintain your position and you should not surrender it merely for the purpose of arriving at a verdict or merely because the majority of the jurors have the opposite leaning.

Upon retiring to the jury room, you will select one of your number to act as your foreman or forelady, who will preside over your deliberations, and who will sign any verdict to which all of you agree. It will be the duty of the one selected to serve as your spokesman in any further proceedings in this Court.

The person selected to act as foreman or forelady of the jury should permit a full and free discussion of the case by the jurors in the jury room. The other jurors should assist the foreman or forelady so selected in keeping the proceedings orderly and expedite the proceedings of the jury in the jury room.

If you desire to see any of the exhibits that have been introduced in evidence, you may advise the court crier of that fact, and that is Mr. Nevis, and the exhibits that you wish to see will be delivered to you in the jury room.

If it should become necessary for you to communicate

with the Court in any matter connected with the case while you are deliberating, I admonish you that you just not disclose to the Court—and remember this, whoever the foreman or forelady or anybody is of the jury—you must not disclose to the Court or to anyone else, to the crier or anyone with whom you are in contact with as you come in and out of the jury room into the courtroom, how you stand numerically. We don't want to know how you stand numerically. Don't come in and say we are locked eight to four one way or the other. Don't tell us that. We don't want to know how you stand until you finally reach the decision in this case. And you have to adhere to that admonition until you reach a verdict.

It will take all twelve of you to reach a verdict. When all twelve of you have agreed upon a verdict, that is the verdict of the jury.

The indictment in this case contains one count only. According to such view as you may take of the evidence, you may return a verdict of guilty or a verdict of not guilty, or you may disagree and fail to reach a verdict. I hope that you will be able to agree and reach a verdict, but the important thing is that you must follow the law and the evidence in this case, and in so doing, all twelve of you are unable to agree on a verdict, it is your privilege to so advise the Court. It is for this latter reason alone that I have mentioned your right to disagree.

Now, the clerk has prepared a form of verdict. This form of verdict has no significance in and of itself, and is not to be considered by you for any purpose other than as a convenience for your use. This form of verdict as prepared by the Clerk reads:

United States District Court for the Northern District of California, United States of America versus Cecil J. Bishop. And then the action number.

We, the jury, find Cecil J. Bishop, the defendant at the bar, blank as to count one.

Now, as I previously stated, you are to consider each one of these counts as a separate charge against the defendant. In other words, you treat it as if it is the only charge that you have. And then you treat the next one as if it is the only charge you have. And then the third one as the only charge. So, we the jury, find Cecil J. Bishop, the defendant

at the bar, blank as to count one, whatever you find, not guilty, guilty, or unable to agree on a verdict.

Then you treat count two the same way and count three. You will see these blanks are there. Then whoever the foreman is will date it over in the lower left-hand corner and then he will sign in the right-hand corner. When you reach that point, rap on the door and the marshal or the crier will come and bring you in.

Will counsel please approach the bench?

(Whereupon the following proceedings were held outside the hearing of the jury:)

THE COURT: Now, does the Government have any objections or exceptions to the instructions as given?

MR. KILGARIFF: No objections or exceptions.

THE COURT: Mr. Johnston, I understand that you do have certain exceptions and objections to the instructions. I will let you state them now.

MR. JOHNSTON: Yes, Your Honor. The defense objects to the Court's failure, refusal to give instructions proposed by the defendant relating to the lesser included offense. I am referring specifically to the defendant's requested instructions number 27, 28, 29 and 31. These instructions are to the effect that if the jury fails to find the defendant guilty under Section 7206(1) that they might find him guilty under Section 7207, which indicates the offense wilfully delivering a false return. Briefly stated, the grounds of our objection is that Section 7207 creates an offense that is a lesser included offense under Section 7206(1) in that not only does 7207 not contain any requirement that the return be verified under penalties of perjury, but also more specifically that under a long line of reported cases the word wilfully as used in a misdemeanor tax section has a different and lesser meaning than the same word when it is used in connection with a felony offense. It is our position that the jury might find the defendant to have possessed the requisite degree of wilfulness to constitute the misdemeanor offense but not sufficient to constitute the felony offense.

THE COURT: All right. Thank you.

MR. JOHNSTON: I have one other point, Your Honor. I noted that instruction of the jury as to the statute involved, which was the subject of the Government's proposed instruction number three, that Your Honor quoted the in-

struction but substituted the word offense for the word felony.

THE COURT: Yes, I always do that. I do not put in the nature of the crime. I paraphrase it and eliminate the word felony or whatever the particular crime. I merely state it is an offense.

MR. JOHNSTON: Well, I don't think this is grounds for objection although I would prefer to have the jury told——

THE COURT: I never do that.

MR. JOHNSTON: ——the offense is a felony.

THE COURT: I don't do that. As a matter of fact, I am surprised that the Government submitted the instruction in that form because normally the Government doesn't put in the felony and you normally paraphrase that and put in the word offense.

MR. KILGARIFF: That's right.

THE COURT: So in any event, I did that purposely.

MR. JOHNSTON: All right. Very well, Your Honor. Thank you.

THE COURT: All right. Now, the record will reflect that the question of allowing the lesser included offense instruction was discussed with counsel and I have briefly expressed with counsel my intention not to give those instructions and my authority for doing so is the Escobar case and also the Sansone case which is cited in the Escobar case.

Further in this particular case, there is no question but the fact of the defendant's signature of the income tax returns under penalties of perjury has been admitted. This is not a fact in evidence. I don't think it's an appropriate application of the rule. That is my excuse for not giving a lesser included offense instruction such as suggested by defense counsel. Moreover, I feel that I am bound by the rule of Escobar. So you now made your record.

MR. JOHNSTON: Yes, Your Honor.

MR. KILGARIFF: Thank you.

(Whereupon the following proceedings were held in the presence of the jury:)

THE COURT: All right. Now, the jury will retire and deliberate upon their verdict. Before you do so, we have come to a sad moment. We must excuse Mrs. Klaner.

Mrs. Klaner, you get full pay for coming here today just to hear me talk for an hour.

JUROR: I am a Government worker.

THE COURT: Oh, it is pay already. Thank you for coming. You are excused and have a merry Christmas.

All right, ladies and gentlemen, you may now retire and deliberate upon your verdict.

(Jury retired to deliberate.)

THE COURT: Now, gentlemen, I am going to give the jury that instruction that you fellows put together. This is defendant's requested instruction number thirty-two. I think they should have this for the reason this contains the figures and the items upon which they will be deliberating. I note I have made an interlineation here on line 21. I added the words "The above." My writing is so poor that I am going to have my secretary erase it and type it in. As soon as that is done, I will give it to the jury. Any objection?

MR. JOHNSTON: No objection.

MR. KILGARIFF: No objection.

THE CRIER: They would like to have the exhibits.

THE COURT: All right. Give them the exhibits. We will be in recess until the jury returns with a verdict.

(Recess.)

THE CLERK: U.S. versus Bishop.

THE COURT: The record will show the jury is all present; the defendant is present with counsel.

Ladies and gentlemen of the jury, it is my understanding that you have reached a verdict; is that correct?

FOREMAN: Yes.

THE COURT: Who is the foreman? Mr. Knoles, will you present the verdict to the marshal?

(Verdict handed to marshal.)

THE COURT: All right, Mr. Clerk, will you read the verdict, please?

THE CLERK: Ladies and gentlemen of the jury, harken to your verdict as it shall stand recorded. It reads as follows: We, the jury, find Cecil J. Bishop, the defendant at the bar, guilty as to Count One, guilty as to Count Two, guilty as to Count Three. Signed, Rexx Knoles.

JUDGMENT AND COMMITMENT (REV. 2-68) CR. FORM NO. 25

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
v. } No. Cr. 14897
CECIL J. BISHOP

[Filed Feb. 16, 1971, Clerk, U.S. District Court, *Eastern District of California,* By ....., Deputy Clerk]

On this 11th day of February, 1971 came the attorney for the government and the defendant appeared in person and by J. Richard Johnston, Esq., Counsel.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty & a Verdict of Guilty has been convicted of the offense of Violation of Title 26 USC, Section 7206 (1)—Willfully Subscribing and Making False Returns as charged in the Indictment (3 Counts) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS as to each Count, such sentences to run concurrently with each other; the first NINETY (90) DAYS of each sentence to be spent in a jail type institution & these sentences also to run concurrently with each other. Remainder of each sentence hereby suspended & defendant shall be placed on probation for a period of FIVE (5) YEARS, following jail term, which is to be served during FORTY-FIVE consecutive 48-hour weekends. As a condition of probation, defendant shall pay a fine in the sum of FIVE THOUSAND ($5,000.00) DOLLARS within SIX (6) MONTHS after implementation of sentence.

IT IS ADJUDGED that Execution of sentence is hereby

stayed pending outcome of appeal & defendant is hereby released on his own recognizance.

Entered in Criminal Docket Feb. 16, 1971

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Thomas J. MacBride
United States District Judge

/s/ William C. Robb
By: .....
Clerk

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 71-1698

UNITED STATES,
PETITIONER,

v.

CECIL J. BISHOP

ORDER ALLOWING CERTIORARI. Filed October 10, 1972.
The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U.S. Government Printing Office: 1972—487-701/287

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13-18) reversing the judgment of conviction is reported at 455 F. 2d 612.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 19) was entered on February 11, 1972, and a petition for rehearing, with the suggestion that it be *en banc*, was denied on April 28, 1972 (App. C, *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the word "willfully" denotes a lower degree of turpitude in 26 U.S.C. 7207, a tax misdemeanor statute, than in 26 U.S.C. 7206(1), a tax felony statute, and thus makes the misdemeanor a lesser-included offense with respect to the felony.

RULE AND STATUTES INVOLVED

Rule 31(c) of the Federal Rules of Criminal Procedure in pertinent part provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged * * *.

Sections 7206 and 7207 of the Internal Revenue Code of 1954 (26 U.S.C.) in pertinent part provide:

Section 7206. *Fraud and false statements.*

> Any person who * * * (1) willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Section 7207. *Fraudulent returns, statements, or other documents.*

> Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by

him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of California, respondent was convicted on three counts of having willfully made and subscribed, under penalties of perjury, income tax returns for 1963, 1964, and 1965 which he did not believe to be true as to material matters, in violation of 26 U.S.C. 7206(1). Respondent was fined $5,000 and sentenced to 90 days' imprisonment (to be spread over 45 weekends) and to five years' probation. The court of appeals reversed and remanded for new trial.

Respondent, a practicing attorney, also owned a walnut ranch (App. A, *infra*, p. 13). In his income tax returns for the years in question, respondent overstated the deductible expenses of the ranch by the following amounts (*id.* at 14):

1963—$19,923.87
1964—$17,021.70
1965—$10,062.86

At trial, respondent testified that in preparing his returns he relied upon information furnished by the ranch manager upon the computations made by his legal secretary (*ibid.*). He requested instructions, interpreting the word "willfully," as used in 26 U.S.C. 7206(1) and 7207, to mean that if the

jury found that he had acted only capriciously or with a careless disregard for the lawfulness of his acts but not with a bad purpose, it could find him guilty of the misdemeanors of willfully filing returns known by him to be false or fraudulent in material matters, in violation of Section 7207, and not guilty of the felonies charged under Section 7206(1).[1] These re-

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[1] The instructions requested by respondent were as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 27

(Lesser-Included Offense)

A lesser included offense is an offense made up of some, but not all, of the elements of the offense charged. The crime of willfully delivering a false return includes the following elements:

(1) That the defendant filed the return; and
(2) That he knew it to be false as to a material matter.

It differs from the offense charged in the indictment in that:

(1) It does not require that the defendant willfully signed a declaration under penalty of perjury, and,
(2) It required a lesser degree of willfulness.

DEFENDANT'S REQUESTED INSTRUCTION NO. 28

(Lesser-Included Offense)

If, as to any count, you are convinced beyond a reasonable doubt that the defendant knew the return to be false as to a material matter, and that he acted with a bad purpose or without reasonable cause, or capriciously, or with careless disregard, but you are not satisfied beyond a reasonable doubt that he had formed the bad or evil purpose of misleading the Government, then you should find him guilty of the lesser offense of delivering a false return.

Similarly, if you are convinced beyond a reasonable doubt both that he knew the return to be false as to a material matter and that he had formed the bad or evil purpose of mis-

quested instructions were refused and respondent was convicted of the felonies as charged.

The court of appeals reversed on the ground that the requested instructions should have been given pursuant to Rule 31(c), Fed.R.Crim.P. In so doing, the court acknowledged that under the facts here, aside from the issue of the necessary degree of willfulness, there was no rational basis for a conviction of the misdemeanor alone (*id.* at 17).[2] However, the court

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leading the Government, but you are not satisfied beyond a reasonable doubt that he knew the return contained a declaration and it was made under the penalties of perjury, you should find him guilty of the lesser offense of delivering a false return.

In other words, you should find the defendant guilty of the lesser offense if you have a reasonable doubt either that the defendant knew that what he signed contained a declaration under penalty of perjury, or that he acted with the specific evil purpose of misleading the Government, but you are satisfied beyond a reasonable doubt as to every other element of the offense as I have described it to you.

DEFENDANT'S REQUESTED INSTRUCTION NO. 29

(Willfulness and Misdemeanors)

The offense charged, willfully making a false return under penalty of perjury, is a felony; whereas the lesser offense of willfully delivering a false return is a misdemeanor. The word willful, as used in misdemeanors, means with a bad purpose or without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act. That the defendant formed the specific evil purpose of misleading the Government with respect to the correct amount of tax due is required for conviction of the felony charged, but it is not required for conviction of the lesser misdemeanor offense of delivering a false return.

[2] See *infra*, pp. 6-7.

reasoned that to establish willfulness in tax felony prosecutions it is necessary to prove "a bad purpose or evil motive" (*id.* at 16), whereas in tax misdemeanor prosecutions it is necessary to show only that the act was committed "without grounds for believing that [it was] lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act" (*id.* at 16-17). On this basis, the court found that an instruction on the lesser offense was required.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is in conflict with this Court's decision in *Sansone* v. *United States*, 380 U.S. 343, and with the decisions of other courts of appeals. If left standing, the decision will adversely affect the administration of the criminal tax laws in the Ninth Circuit and may also hamper prosecutions of non-tax felonies involving willfulness.

1. Rule 31(c), Fed.R.Crim.P., incorporates the general rule that a defendant is entitled to have the jury instructed as to a lesser-included offense. However, this Court has repeatedly held that "[t]he lesser-included offense doctrine does not apply if the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses * * *." 2 Wright, *Federal Practice and Procedure: Criminal* 374 (citing *Sansone* v. *United States*, 380 U.S. 343; *Berra* v. *United States*, 351 U.S. 131; *Sparf* v. *United States*, 156 U.S. 51). Respondent conceded in his brief below (at pp. 13-14) and the court of appeals

recognized (App. A, *infra*, p. 17), that under the circumstances here the acts prohibited by the felony and misdemeanor statutes were identical,[3] and therefore, that with the possible exception of the degree of willfulness, the same factual issues were left for resolution under both statutes. Thus this case presents the same question which this Court resolved in *Sansone* v. *United States*, *supra*.[4]

In *Sansone*, the defendant was charged with willfully attempting to evade taxes in violation of 26 U.S.C. 7201, a felony. He requested instructions that he could be acquitted of the felony charge but convicted of violating Section 7207, the same misdemeanor statute involved in this case.[5] After finding that under the circumstances there the two statutes prohibited the same acts, the Court concluded (at 353):

> * * * [I]f, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did * * * he was guilty of violating both §§ 7201 and 7207. If his action was not willful,

[3] It is an element of the offense under Section 7206(1), the felony statute, that the false return be made under the penalties of perjury. This element is absent in the misdemeanor statute, Section 7207, which simply proscribes the delivery of a false return. In this case, however, it was undisputed that the false returns were subscribed under penalties of perjury.

[4] Indeed, *Sansone* seems so directly controlling of the issue here that summary reversal may be appropriate.

[5] The defendant in *Sansone* also requested a charge on another misdemeanor offense, 26 U.S.C. 7203.

> he was guilty of violating neither. * * * [O]n the facts of this case, § § 7201 and 7207 "covered precisely the same ground," *Berra* v. *United States*, *supra*, at 134, and thus petitioner was not entitled to a lesser-included offense charge based on § 7207.

This Court in *Sansone* therefore foreclosed the general argument, relied upon by the court below, that tax felonies require a higher degree of willfulness than tax misdemeanors. See also *Spies* v. *United States*, 317 U.S. 492. Furthermore, this case cannot be meaningfully distinguished from *Sansone*. Although the felony provision involved in *Sansone* was Section 7201 rather than Section 7206(1),* both require that the prohibited act be committed "willfully"; and there is no basis for concluding that the same word describes a higher degree of volition in one of those felony statutes than it does in the other. Therefore if, as *Sansone* holds, Section 7201 and 7207 employ the same test of willfulness, so do Sections 7206(1) and 7207. Moreover, nothing appears in the language, history, or purpose of the latter provisions which suggests that they invoke different volitional standards. Therefore, in this case the two statutes "covered precisely the same ground" and no instruction as to the lesser offense was required.

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* Section 7206(1), like Section 7201, imposes no minimum penalties. "The lack of minimum penalties * * * denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor." *Sansone*, 380 U.S. at 350 n. 6.

2. The holding below is also in conflict with the Fifth Circuit's decision in *Escobar* v. *United States*, 388 F. 2d 661, certiorari denied, 390 U.S. 1024. There, as here, the defendant was charged with willfully making and subscribing false income tax returns, in violation of Section 7206(1). His request for instructions on the misdemeanor under Section 7207 was denied, and the Fifth Circuit affirmed the conviction, stating (at 666):

> Accepting these [*Sansone*] guidelines, the question narrows to whether there is "a disputed factual element" in Section 7206(1) which is not present in Section 7207. As pointed out the only difference between the two statutes is in the "made under the penalties of perjury" requirement in Section 7206(1). If there was any question for the jury concerning whether some or all of the returns involved here were or were not "made under the penalties of perjury" appellant would have been entitled, under *Sansone*, to the requested charge. However, appellee contends, and appellant does not dispute, that all returns involved here contain the "perjury declaration." Therefore, there was no factual dispute concerning the charged greater offense to be submitted to the jury, *ergo* appellant was not entitled to his requested charge.

Accord: *United States* v. *Mathews*, 335 F. Supp. 157 (W.D. Pa.), defendant's appeal dismissed (C.A. 3, No. 72-1085, decided June 6, 1972). The Fifth Circuit thus has rejected any distinction between the kinds of willfulness required under the felony and misdemeanor provisions involved in this case.

The holding below also enunciates a lower standard of willfulness in misdemeanor cases than has been deemed acceptable by other courts of appeal.[7] In *United States* v. *Vitiello*, 363 F. 2d 240, 241-242 (C.A. 3), and *Haner* v. *United States*, 315 F. 2d 792, 793 (C.A. 5), involving prosecutions for tax misdemeanors, instructions permitting conviction on the basis of a careless disregard of the truth were held to constitute reversible error because they created the risk that juries might convict for conduct they found to be the result of mere carelessness. This standard

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[7] The standard stated by the court results from a misapplication of this Court's language in *United States* v. *Murdock*, 290 U.S. 389. In that case this Court stated (at 394-395):

> The word [willfulness] is also employed to characterize a thing done without ground for believing it is lawful * * *, or conduct marked by careless disregard whether or not one has the right so to act * * *.

This language has been a source of some confusion (see, *e.g.*, *Bloch* v. *United States*, 221 F. 2d 786, 789 (C.A. 9)), despite this Court's clarifying explanation in *United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239, in which it is stated (at 242-243):

> In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States* v. *Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act."

It is thus apparent that the "careless disregard" language of *Murdock* can have no application to Section 7207, for that provision denounces an "offense involving turpitude."

of "careless disregard" is, moreover, weaker than that prescribed by this Court in *Sansone* (see *supra*, p. 7).

3. By granting juries discretion in this context to find only misdemeanor offenses in felony prosecutions, the decision below has diminished the rationality of the process of criminal tax adjudication in the Ninth Circuit. Convictions under Section 7207 rendered pursuant to the rule laid down by the court below will represent miscarriages of justice: on the one hand, if the defendant is in fact guilty of the felony, legitimate exercise of the prosecutor's discretion that he be punished for the more serious crime Congress has defined is frustrated by conviction only of the misdemeanor (cf. *United States* v. *Whitaker*, 447 F. 2d 314, 317, n. 8 (C.A. D.C.)); on the other hand, if he is not guilty of the felony, a conviction of the misdemeanor based on a jury finding of mere carelessness is unwarranted.

Furthermore, although the court's interpretation of "willfully" as denoting a different volitional element for felonies than for misdemeanors was expressly restricted to tax prosecutions, there appears no reasoned basis for not extending this dual construction to non-tax criminal statutes. Such an extension could seriously impair prosecutions under other felony statutes requiring a showing of willfulness.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1972.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1950

[Filed Feb. 11, 1972, Wm. B. Luck, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CECIL J. BISHOP, DEFENDANT-APPELLANT

Appeal from the United States District Court
For the Eastern District of California

BEFORE: ELY and WRIGHT, Circuit Judges, and
POWELL, District Judge*

POWELL, District Judge:

This appeal is taken from conviction on three counts of willfully making and subscribing, under penalties of perjury, false income tax returns in violation of 26 U.S.C. § 7206(1).

The taxpayer was a practicing attorney in Sacramento, California. He also operated a walnut ranch near Red Bluff, California, which was managed by his stepmother. During the years covered by the indictment, 1963, 1964, and 1965, the ranch operated at a loss. The taxpayer reported no tax for the years 1963 and 1964; his tax in 1965 was $1,018.98. The charge of false declaration on the taxpayer's personal income tax returns arose out of items which he listed as de-

* Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

ductible farm expenses incurred in the operation of the ranch. As ranch manager, the taxpayer's stepmother kept records of the day-to-day expenses. To meet these expenses the taxpayer sent weekly checks to his stepmother; occassionally he paid creditors directly. At the end of the year his stepmother furnished an itemized accounting of all expenses, to which all expenses paid directly to creditors were added. The lists of expenses furnished were turned over to one of the secretaries in the taxpayer's law office. From these lists with other expenses, schedules of expenses were prepared, which were entered by the taxpayer on his income tax returns.

The understatement of income resulted from the addition of expenses. To the itemized list of expenses, including the expenses paid directly to creditors, the taxpayer added all the payments made to his stepmother as ranch manager. The effect was to double deductible expenses. This procedure resulted in the overstatement of farm expenses in the following amounts: in 1963—$19,923.87; in 1964—$17,021.70; and in 1965—$10,062.86. The taxpayer testified that he relied upon the computations of his stepmother and his legal secretary.

The taxpayer complains of three errors, specifically that: First, in his prosecution for violation of 26 U.S.C. § 7206(1), he was entitled under the evidence to a jury instruction by which the jury could find him guilty of a violation of 26 U.S.C. § 7207, as a lesser included offense; Second, it was error to admit his 1961 return; and Third, it was error to admit that an item of farm income accruing in 1965, was reported in his 1964 return.

The taxpayer's first argument is well taken. Rule 31(c) of the Federal Rules of Criminal Procedure

permits the jury to find the defendant guilty of an offense not charged in the indictment if that offense is "necessarily included in the offense charged." The instruction submitted and rejected was essentially 26 U.S.C. § 7207,[1] which is a misdemeanor. The contention is that this section is a lesser included offense of 26 U.S.C. § 7206(1).[2] The doctrine of the lesser included offense requires that there be similar factual elements as to both the lesser and the greater offenses; but that the elements of the lesser offense be included within, but not completely subsumed by the greater. See *Olais-Castro* v. *United States*, 416 F.2d 1155, 1157 (9th Cir. 1969); *James v. United States*, 238 F.2d 681, 683 (9th Cir. 1956); 8 Moore's Federal Practice ¶ 31.03.

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[1] "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, know by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to sections 6047(b) or (c), 6056, or 6104(d), to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

[2] "Any person who—

(1) Declaration under penalties of perjury.—Wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Both Sections 7206(1) and 7207 contain the element of wilfulness. In income tax prosecutions this circuit has repeatedly interpreted the word "wilfulness," as used in a misdemeanor statute, to mean something less than the same word "wilfulness" used in a felony statute. *United States* v. *Haseltine*, 419 F.2d 579 (9th Cir. 1969); *United States* v. *Fahey*, 411 F.2d 1213 (9th Cir. 1969), *cert. denied*, 396 U.S. 957 (1969); *Eustis* v. *United States*, 409 F.2d 228 (9th Cir. 1969); *Edwards* v. *United States*, 375 F.2d 862 (9th Cir. 1967); *Martin* v. *United States*, 317 F.2d 753 (9th Cir. 1963); *Abdul* v. *United States*, 254 F.2d 292 (9th Cir. 1958).

Abdul v. *United States*, 254 F.2d 292, 293 (9th Cir. 1958), best highlights the distinction drawn under the tax statutes between felonies and misdemeanors:

> "The meaning of the word 'wilfully' as used in the tax statutes has been considered in a number of cases and seems to have come to rest in this Circuit, as well as others, as meaning with respect to felonies, 'with a bad purpose or evil motive.' But the meaning of the word 'wilfully' as used in the statute defining a misdemeanor has not as yet reached such repose." (citations omitted.)

See also, *United States* v. *Murdock*, 290 U.S. 389, 396 (1933).

The court instructed the jury in *Abdul* v. *United States*, *supra* 294, with the following definitions of wilfulness:

> "The word 'wilful' as used in [the misdemeanor] counts * * *, that is, failing to make a tax return, means with a bad purpose *or without*

> *grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act.* The word 'wilful' as used in the [felony] counts * * * that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive." (Emphasis added.)

These extended instructions in *Abdul* were intended to clarify the meaning of "wilful" in the misdemeanor counts, under Sections 7203 and 7207.

Both Sections 7206(1) and 7207 apply to the filing of false and fraudulent returns. *Sansone* v. *United States*, 380 U.S. 343, 347-49 (1965). Violation of Section 7207 is a misdemeanor, whereas violation of Section 7206(1) is a felony. Under the evidence presented the elements of the two offenses are the same, with the exception of the element of wilfulness.[3] Following *Abdul* "wilfulness," within the meaning of Section 7206(1), requires proof of an evil motive and bad faith. Evidence under Section 7207 need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed.

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[3] Section 7206(1) contains the added element of subscription under "penalties of perjury," which Section 7207 does not. However, where an individual income tax return is filed, Section 6065(a), in conjunction with Treas. Reg. § 1.6065-1(a), 26 C.F.R., imposes this element under Section 7207 by operation of law.

Under the circumstances of this case it was error to reject an instruction embodying Section 7207, as a lesser included offense. Since this case will be remanded for retrial it is not necessary to determine the merits of the second and third assignments of error.

Reversed and remanded for a new trial in accordance with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1950

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CECIL J. BISHOP, DEFENDANT-APPELLANT

APPEAL from the United States District Court for the Eastern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered February 11, 1972

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 1, 1972, Clerk]

No. 71-1950

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CECIL J. BISHOP, DEFENDANT-APPELLANT

BEFORE: ELY and WRIGHT, Circuit Judges, and
POWELL, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: April 28, 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 488088 857

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1971

No. 71-1698

UNITED STATES OF AMERICA, *Petitioner*

vs.

CECIL J. BISHOP

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Was the court of appeals correct in holding that Section 7207 of the Internal Revenue Code of 1954 (26 U.S.C.) is a lesser included offense of Section 7206(1) of that Code?

ARGUMENT

A defendant is entitled to a lesser included offense instruction where some (but not all) of the elements of the offense charged themselves constitute a lesser

offense. However, no such instruction is proper where the facts to be resolved by the jury are the same as to both the lesser and greater offenses. *Sansone v. United States,* 380 U.S. 343 (1965); *Berra v. United States,* 351 U.S. 131 (1956); *Spies v. United States,* 317 U.S. 492 (1943). The parties agree, and the court of appeals found (Pet. 17), that, with the exception of the element of willfulness, the elements of the felony and the misdemeanor here involved are the same. Thus, the court of appeals' decision turned on its holding that in income tax prosecutions "the word 'willfulness,' as used in a misdemeanor statute, . . . mean[s] something less than the same word 'willfulness' used in a felony statute. [Citations omitted]." (Pet. 16)

1. This Court has long held that the requirement of willfulness in a tax felony prosecution is different from and greater than the same requirement in a tax misdemeanor prosecution. *United States v. Murdock,* 290 U.S. 389 (1933)[1]; *Spies v. United States, supra.* Twice during its October Term, 1969 this Court refused to review decisions of two circuits applying a lower standard of willfulness in tax misdemeanor prosecutions. *United States v. Fahey,* 411 F. 2d 1213

[1]Petitioner suggests that the Court in *Murdock* limited its lower standard of willfulness to cases not involving turpitude. (Pet. 10, fn. 7) In that decision, however, this Court cited cases in support of its position which applied the lower standard of willfulness to offenses involving turpitude. E.g. *Clay v. State,* 52 Tex. Cr. R. 555, 107 S.W. 1129 (1908) (Perjury); *Lynch v. Commonwealth,* 131 Va. 762, 109 S.E. 427 (1921) (Battery); *State v. Savre,* 129 Iowa 122, 105 N.W. 387 (1904) (Vote fraud). In addition, this Court indicated in *Spies v. United States, supra,* 497-498 that such lower standard applied to tax misdemeanors.

(C.A. 9, 1969), cert. denied 376 U.S. 957[2]; *United States v. Matosky,* 421 F. 2d 410 (C.A. 7, 1970), cert. denied 398 U.S. 904. Since there are two standards of willfulness in tax prosecutions, one applying to felonies and the other to misdemeanors, there was a disputed element entitling the respondent to a lesser included offense instruction.

2. The court of appeals decision does not conflict with this Court's decision in *Sansone v. United States, supra.* In *Sansone,* on the facts peculiar to that case, the Court held that a lesser included offense instruction was not appropriate[3]. Petitioner places principal reliance for its position on an isolated passage in that opinion (quoted at Pet. 7-8) which states that if certain actions were willful in connection with violating Sec. 7201, they were willful in connection with violating Sec. 7207. That passage, if taken alone and out of context, might be deemed to support petitioner's argument here. It might also be considered as stating a much lower standard of willfulness in tax felony cases than that for which the petitioner now contends. However, a reading of the balance of the opinion shows that the Court was analyzing the particular evidence in that case and not establishing a standard of willfulness in conflict with that of the court of appeals decision below. This is apparent from

[2]The court of appeals in the instant case based its decision in part upon the *Fahey* case (Pet. 16).

[3]The Court was primarily concerned with whether an intent to pay the tax at a later date vitiated taxpayer's admission that he knew that he had underreported his income. *Sansone v. United States, supra,* pp. 344-345. The instant case presents no comparable facts.

the latter portion of the *Sansone* opinion, where the Court reached but did not decide the question of whether the word "willful" had the same meaning under Sec. 7201 and Sec. 7207. Instead, it merely stated that an intent to report and pay tax at a future date does not vitiate the willfulness required for conviction of either the felony or the misdemeanor. *Sansone v. United States, supra* 354.

Petitioner argues that, in an income tax case, Sec. 7206(1) and Sec. 7207 are the same and that such argument is dictated by the opinion in *Sansone*. That argument is itself in conflict with *Sansone,* since it would presume that Congress enacted two sections that are identical except as to penalty. Such a presumption was expressly rejected by this Court in *Sansone*[4]. Petitioner's argument is an attempt to elevate the factual analysis in *Sansone* to a broad holding overruling prior decisions of long standing in *United States v. Murdock, supra* and *Spies v. United States, supra.* It is submitted that petitioner's position is incorrect and that the instant case is consistent with *Sansone, Murdock* and *Spies.*

3. The decision of the court below reaches a different result from that reached on the same issue in *Escobar v. United States,* 388 F.2d 661 (C.A. 5, 1967), cert. denied, 390 U.S. 1024[5]. The Fifth Circuit in

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[4]See fn. 6, *infra.*

[5]On petition for certiorari to this Court, the parties in *Escobar* dealt with whether the Government was required to prosecute under Sec. 7207 rather than Sec. 7206(1) and not with whether a lesser included offense instruction was required. Memorandum for United States in Opposition, p. 2. However, whether there is a difference in the meaning of willfulness in felony and misdemeanor prosecutions was never raised in this Court or the court of appeals.

Escobar based its decision on the absence of any factual dispute as to whether the returns involved were made under the penalties of perjury[6]. It apparently did not consider whether the difference in the standard of willfulness in misdemeanor and felony prosecutions constituted an operative difference between the two codes sections. Until the Fifth Circuit decides this specific issue, review of the issue by this Court to resolve an apparent conflict is premature since the Fifth Circuit may well resolve this conflict consistently with the opinion below.

Petitioner also contends that there is a conflict between the decision in this case and the decisions in *United States v. Vitiello,* 363 F. 2d 240 (C.A. 3, 1966) and *Haner v. United States,* 315 F. 2d 792 (C.A. 5, 1963) which purportedly hold that the standard of willfulness is the same in tax felony and misdemeanor prosecutions. However, petitioner has repeatedly represented to this Court that there is no such conflict and that willfulness has different meanings in felony and misdemeanor contexts. In his Brief in Opposition in *Abdul v. United States* (October Term, 1960,

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[6]Petitioner placed reliance on that same factor in its brief below (at p. 9) but apparently abandons the contention here. As the court of appeals pointed out (Pet. 17, fn. 3), all income tax returns are required to be made under penalty of perjury (Internal Revenue Code of 1954, Section 6065(a) (26 U.S.C.); Treasury Regulations on Income Tax (1954 Code), §1.6065-1(a) (26 C.F.R.)) so that the element of penalty of perjury is present in both sections. Therefore, if petitioner is correct in arguing that the requirement of willfulness is the same for Section 7206(1) and 7207, both Sections are identical as applied to income tax prosecutions. This Court, however, has been "unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area." *Sansone v. United States, supra,* at 348. Accord: *Spies v. United States, supra,* at 497.

No. 104), the Solicitor General states (pp. 4-5):

> Despite the petitioner's assertion to the contrary (Pet. 20-29), the element of willfulness in the context of charges of failure to file tax returns [a misdemeanor] need not be defined in the precise terms of "evil motive *** bad faith or evil intent." In *Spies v. United States* 317 U.S. 492, 497-498, this Court, differentiating between the meaning of willfulness in connection with misdemeanor and felony charges, pointed out that "[m]ere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness," where the charge involved a failure to file.
>
> * * *
>
> Similar instructions were upheld on the previous appeal, *Abdul v. United States,* 254 F. 2d 292 (C.A. 9),[7] and have been sustained in other circuits. *Ripperger v. United States,* 230 F.2d 56 (C.A. 4); *United States v. Littman,* 246 F. 2d 206 (C.A. 3); *Haskell v. United States,* 241 F. 2d 790 (C.A. 10).

Then in the Brief for the United States in Opposition in *Matosky v. United States* (October Term, 1969, No. 1350) the following appears at pp. 5-6:

> This case involves no conflict in authority. Only this Term the Court denied a petition for certiorari presenting the same question presented here. See *Fahey v. United States,* 396 U.S. 957, rehearing denied, 396 U.S. 1063. Petitioner's reliance (Pet. 7) on *Haner v. United States,* 315 F.

[7]It was this case from which the court of appeals quoted its standard of willfulness in its opinion below. (Pet. 16-17)

> 2d 792 (C.A. 5), and *United States v. Vitiello,* 363 F. 2d 240 (C.A. 3), is misplaced. In each of these cases a conviction was reversed because the court of appeals believed the instructions would have permitted a conviction under Section 7203 merely on the finding of careless or negligent conduct. No such instructions were given here; the jury was told that "willfully" in Section 7203 "means simply voluntary, purposeful, deliberate and intentional conduct as distinguished from accidental, inadvertent or negligent conduct" (Pet. 6).

See Brief for the United States in Opposition in *Fahey v. United States,* (October Term, 1969, No. 576) at pp. 7-8.

Thus, as petitioner has conceded in other cases, there is no clear-cut conflict with the Ninth Circuit's dual standard of willfulness in tax prosecutions. Some circuits, as in *Haner* and *Vitiello,* have required that the lower standard for misdemeanor conviction be limited to preclude conviction for mere negligence. However, on the issues involved here, neither *Haner* nor *Vitiello* is in conflict with the Ninth Circuit's definition of willfulness.

4. There is no merit to petitioner's contention that the instant case will adversely affect the criminal process in the Ninth Circuit. Its argument that a jury may acquit a defendant guilty of a felony and convict of a misdemeanor assumes both offenses to be identical. We have shown that the offenses are not iden-

tical. Instructions differentiating the two standards of willfulness formulated by the court of appeals will enable a jury to reach a proper verdict.[8]

We find it difficult to credit the petitioner's concern that defendants will be convicted on a finding of mere carelessness, in view of the fact that the petitioner has always attempted, with considerable success, to have the lower standard of willfulness, of which it now complains, applied in misdemeanor tax prosecutions and has consistently resisted attempts by defendants who were thus convicted to obtain review by this Court. (See excerpts from Briefs for the United States in Opposition in the *Abdul* and *Matosky* cases, *supra.)*

Finally, petitioner fails to justify its argument that the standards of willfulness adopted by the Ninth Circuit will be applied in non-tax offenses. The court of appeals specifically limited its holding below to income tax prosecutions (Pet. 16), undoubtedly because it was aware that offenses under the income tax laws constitute a logical hierarchy in which a felony frequently includes lesser offenses. *Spies v. United States, supra,* at 497. Should the Ninth Circuit later extend its rule to other offense where the rule is not proper, petitioner may seek review by this Court. The instant case, however, involves only an income tax prosecution.

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[8]It is of course axiomatic that any lesser included offense instruction impinges in some degree upon the prosecutor's discretion. Nevertheless, the lesser included offense instruction has long been part of our jurisprudence. Schmidt and Thatcher, *Lesser Included Income Tax Offenses,* 17 Tax L. Rev. 463, 467-468 (1961).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, July 21, 1972.

Respectfully submitted,
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JOHNSTON, KLEIN, HORTON & SOLOMON,
Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Three comments may be made with respect to the brief in opposition filed by respondent: (1) it disregards the specific holding below, which supports the "lesser included offense" basis of decision by approving conviction of a tax misdemeanor involving turpitude, 26 U.S.C. 7207, on the basis of merely negligent conduct; (2) it erroneously deduces from this Court's decisions that all tax misdemeanors involve a lesser degree of willfulness than is necessary to support a conviction of the tax felony charged here under 26

U.S.C. 7206(1); and (3) it incorrectly states the position taken by the government in opposing certiorari in cases involving convictions under tax misdemeanor provisions other than 26 U.S.C. 7207.

1. Respondent offers no justification for the decision below, which finds the misdemeanor a lesser included offense by concluding that conviction of a misdemeanor involving turpitude may be sustained on the basis of mere negligence or "careless disregard." It is important to bear in mind that the term "willfully" is used here as part of a specific statute, in its setting; thus, discussions of the level of culpability that may be sufficient for misdemeanor convictions under general principles of criminal law are not on point. Here, the interpretation given to this term by the court below ignores its context—specifically the language of the statute, 26 U.S.C. 7207, which speaks of "willful" conduct with respect to statements or documents which are "known" by the defendant "to be fraudulent or to be false" in a material way. Neither respondent nor the court below makes any effort to reconcile a volitional standard of mere carelessness with the statutory requirement of knowledge of falsity, and it is submitted here that they are irreconcilable. The terminology employed in the statute implies not mere carelessness but design and intent to deceive. In such a context it cannot be assumed that Congress used the term "willfully" to apply to something less than intentional conduct.

2. The decision of the court below was based on its view that all misdemeanors involve a lesser degree

of willfulness than do tax felonies, and respondent contends (Br. in Opp. 2-4) that this view is not only supported by *United States* v. *Murdock*, 290 U.S. 389, and *Spies* v. *United States*, 317 U.S. 492, but is not in conflict with *Sansone* v. *United States*, 380 U.S. 343. Both of these propositions are erroneous.

Murdock involved a prosecution for the misdemeanor of willful failure to supply information for purposes of the computation of a tax, in violation of a predecessor of 26 U.S.C. 7203, and this Court held that the requirement of willfulness in that statute made "bad faith or evil intent" (290 U.S. at 389) an element of the offense. Similarly, in *Spies*, this Court insisted on "some element of evil motive" (317 U.S. at 498) as an element of the tax misdemeanor of willfully failing to pay a tax (26 U.S.C. 7203).[1] Thus the underlying rationale of the decision below, *i.e.*, that conscious intent is an element of tax felonies but not of tax misdemeanors, is in conflict with, and not supported by, *Murdock* and *Spies*. Nor is that rationale supported by *Sansone*, for, as the Third Circuit correctly observed in *United States* v. *Vitiello*, 363 F. 2d 240, 243, this Court in *Sansone* prescribed the

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[1] In the same paragraph of the *Spies* opinion, the Court approved "[m]ere voluntary and purposeful" conduct as the standard of willfulness for the tax misdemeanor of willful failure to file a tax return, in violation of 26 U.S.C. 7203. It is clear, therefore, that this Court has interpreted the requirement of "willfulness" in light of the particular nature of the activities Congress sought to prohibit and not on the basis of an arbitrary distinction between misdemeanors and felonies.

same volitional standard of conscious intent for both the felony of willfully attempting to evade tax (26 U.S.C. 7201) and the misdemeanor of willfully failing to pay a tax when due (26 U.S.C. 7203).[2] See *Sansone, supra*, 380 U.S. at 350-352; see also Pet. 6-8.

3. Contrary to respondent's claim (Br. in Opp. 5-7), the government's opposition to certiorari petitions in earlier cases is not inconsistent with the present contention that "careless disregard" is an inappropriate and unauthorized standard of willfulness under 26 U.S.C. 7207. Two of the cases cited by respondent involved convictions for willfully failing to file tax returns, in violation of 26 U.S.C. 7203, under a standard of "voluntary, purposeful, deliberate and intentional conduct." *Matosky* v. *United States* (No. 1350, O.T. 1969), certiorari denied, 398 U.S. 904; *Fahey* v. *United States*, (No. 576, O.T. 1969), certiorari denied, 396 U.S. 957. The standard of willfulness ap-

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[2] Although repsondent hesitates to acknowledge the existence of a conflict among the courts of appeals (Br. in Opp. 5), both the Third Circuit in *Vitiello* and the Fifth Circuit in *Haner* v. *United States*, 315 F. 2d 792 (C.A .5), have noted that their decisions conflict with the decision of the Ninth Circuit in *Abdul* v. *United States*, 254 F. 2d 292, on second appeal, 278 F. 2d 234, certiorari denied, 364 U.S. 832, upon which the Ninth Circuit relied in this case. Furthermore, while respondent suggests (Br. in Opp. 4-5) that the decision below is not clearly in conflict with *Escobar* v. *United States*, 388 F. 2d 661 (C.A. 5), certiorari denied, 390 U.S. 1024, because the Fifth Circuit might still adopt a lower standard of willfulness in tax misdemeanor cases, it is clear from the Fifth Circuit's decision in *Haner* that it has rejected the Ninth Circuit's standard of "careless disregard."

plied in those cases was approved by the government in its briefs in opposition, and we continue to urge a standard of conscious, intentional conduct.

The third case cited by respondent, *Abdul* v. *United States* (No. 104, O.T. 1960), certiorari denied, 364 U.S. 832, involved a conviction for willful failure to file a tax return in violation of 26 U.S.C. 7203; the jury charge had included a volitional standard of "careless disregard." In our brief in opposition, the government did not seek to defend the "careless disregard" instruction but rather noted that the jury charge had included language giving forceful emphasis to the necessity of finding intentional and purposeful conduct; in our view, the additional language relating to "careless disregard" was not prejudicial error in that context.[3]

For the reasons stated above, and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[3] Respondent argues (Br. in Opp. 5) that the government contended in its brief in opposition to certiorari in *Abdul* that there was no conflict among the circuits. However, the *Haner* and *Vitiello* cases, which created a conflict among the courts of appeals on the issue of the propriety of "careless disregard" instructions, were not decided until after certiorari was denied in *Abdul*.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 477796 209

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-18) is reported at 455 F. 2d 612.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19) was entered on February 11, 1972, and a petition for rehearing, with suggestion of rehearing *en banc,* was denied on April 28, 1972 (Pet. App. 20). On May 27, 1972, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until June 30, 1972.

The petition for certiorari was filed on June 27, 1972, and was granted on October 10, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent, who was charged with an income tax felony under 26 U.S.C. 7206(1), was entitled to a lesser-included offense instruction invoking a tax misdemeanor statute, 26 U.S.C. 7207, on the ground that the willfulness standard in the misdemeanor statute is both lower than that in the felony statute and also may be satisfied by a finding that respondent merely acted capriciously or carelessly in filing tax returns known to be materially false or fraudulent.

STATUTES AND RULE INVOLVED

Sections 7206(1) and 7207 of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1) and 7207, in pertinent part provide:

Section 7206(1).

> Any person who—
> (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter* * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or

imprisoned not more than 3 years, or both, together with the costs of prosecution.

Section 7207.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.* * *

Rule 31(c) of the Federal Rules of Criminal Procedure in pertinent part provides:

The defendant may be found guilty of an offense necessarily included in the offense charged * * *.

STATEMENT

A three count indictment returned in the United States District Court for the Eastern District of California charged that respondent, under the penalties of perjury, willfully made and subscribed income-tax returns which he did not believe to be true and correct as to every material matter, in violation of 26 U.S.C. 7206(1). Respondent was convicted as charged after a jury trial. He was fined $5,000 and sentenced to 90 days' imprisonment in a jail-type institution (to be served during 45 consecutive 48-hour weekends) and to five years' probation. The court of appeals, however, reversed and remanded for a new trial, holding that respondent was erroneously denied an instruction to

the jury on what the court concluded was a lesser included offense.

1. Respondent, a practicing attorney, was prosecuted for the felony of willfully filing false income tax returns for 1963, 1964, and 1965, in violation of 26 U.S.C. 7206(1). The returns were false in that they significantly overstated the deductible expenses of a walnut ranch which he owned (Tr. 861-862; 947).[1] At trial respondent did not dispute the falsity of the returns (Tr. 869-870, 1148).

The walnut ranch was managed by respondent's stepmother (Tr. 72). Respondent gave her weekly checks which she deposited to a separate bank account, and she paid the ordinary operating expenses of the ranch from that account (Tr. 73-77). At the end of each year respondent's stepmother provided him with a detailed accounting of all deductible ranch expenses which she had paid during the year (Tr. 81-84, 91, 95, 135, 162, 168). Respondent deducted these items as ranch expenses on his income tax returns. However, respondent additionally deducted as ranch expenses the amounts which he had furnished to his stepmother during the year (Tr. 861-862). In this way respondent in effect took two deductions for each item of ranch expense his stepmother paid: he took one deduction for the initial transfer of funds to her and a second deduction for the actual expenditure by her (Tr. 576).

Furthermore, the amount respondent paid over to his stepmother covered not only ranch expenses but also a substantial number of nondeductible personal items,

[1] "Tr." refers to the trial transcript, a copy of which is being lodged with the Clerk of this Court.

including his weekend entertainment expenses at the ranch (Tr. 73-74). In addition, respondent improperly claimed deductions for the educational expenses of his stepmother's son, which he had paid, and for the repayments of the principal on a number of loans (Tr. 861-862). The aggregate amount of improper deductions taken by respondent for the three years exceeded $45,000 and was substantial in relation to his gross income.[2]

When Internal Revenue Service agents interviewed respondent concerning his underreporting, he claimed that his secretary had assisted him in preparing his returns by furnishing him with a schedule of all business-related disbursements from his checking account and that he had relied upon her to delete all nondeductible items (Tr. 815).

2. Respondent contended at trial that he had no knowledge of the falsity of the statements of ranch expenses contained in his returns (Tr. 870, 891, 893, 911, 916, 917, 1148-1150). However, he requested that the jury be charged on the misdemeanor offense of willfully filing false statements, in violation of 26 U.S.C. 7207, which he contended was a lesser offense included in the felony with which he was charged. His three requested in-

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[2] The following table partially reconstructs respondent's income tax returns (Gov't. Exs. 1-3) for the years in question and illustrates the substantial underreporting of income:

	1963	1964	1965
Gross Income	27,907	19,452	22,818
Less: Reported Farm Loss	26,413	19,388	16,046
Reported Total Income	*1,494*	*64*	*6,772*
Plus: Improper Deductions	19,924	17,022	10,063
Actual Total Income	*21,418*	*17,086*	*16,835*

structions (these are set out in the Appendix, *infra*, pp. 25-26) stated in effect that the standard of willfulness in the misdemeanor offense is lower than that in the felony offense and could be satisfied by a finding that he knew the returns to be false as to material matters but acted capriciously or carelessly in filing them. These requested instructions were refused and respondent was convicted of the felonies as charged in the indictment.

3. The court of appeals reversed on the ground that the requested instructions should have been given pursuant to Rule 31(c) of the Federal Rules of Criminal Procedure. The court acknowledged that under the evidence presented there was no rational basis, aside from the question of willfulness, for a jury determination that respondent was guilty of the misdemeanor but not of the felony. But the court noted that since its decision in *Abdul* v. *United States*, 254 F. 2d 292 (C.A. 9), it had "repeatedly interpreted the word 'willfulness', as used in a [tax] misdemeanor statute, to mean something less than the same word 'willfulness' used in a [tax] felony statute" (455 F. 2d at 614; Pet. App. 16). The court then stated the willfulness standards for the statutes involved here in the following terms (455 F. 2d at 614-615; Pet. App. 17):

> * * * "wilfulness," within the meaning of Section 7206(1) [the felony statute], requires proof of an evil motive and bad faith. Evidence under Section 7207 [the misdemeanor statute] need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed.

INTRODUCTION AND SUMMARY

Rule 31(c) of the Federal Rules of Criminal Procedure permits the jury to find a defendant guilty of a lesser offense necessarily included in the offense charged. This incorporates the prior common law doctrine that a defendant is entitled to have the jury instructed as to a lesser-included offense. See, generally, 2 Wright, *Federal Practice and Procedure: Criminal* § 515 (1969). Insofar as is here relevant, the lesser-included offense doctrine has two major qualifications. The first qualification is that the doctrine only applies where the lesser offense contains some but not all of the elements of the greater offense and, under the evidence presented, the jury may rationally conclude that the defendant was guilty of the lesser offense but not guilty of the greater; an instruction on the lesser offense need not be given where the evidence does not permit the jury rationally to find the defendant guilty of the lesser offense only. *Sansone* v. *United States,* 380 U.S. 343; *Berra* v. *United States,* 351 U.S. 131; *Sparf and Hansen* v. *United States,* 156 U.S. 51. In short, "[t]he lesser-included offense doctrine does not apply if the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses * * *." 2 Wright, *supra,* at 374. As this Court has noted, this limitation on the lesser-included offense doctrine is necessary, for "to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge." *Sansone* v. *United States, supra,* at 350, n. 6.[3] Furthermore, conviction of

only the misdemeanor in such circumstances frustrates legitimate exercise of the prosecutor's discretion. Cf. *United States* v. *Whitaker,* 447 F. 2d 314, n. 8 (C.A. D.C.).

Secondly, the lesser-included offense doctrine also does not apply if an element required for the lesser (less serious) offense is not contained in the greater (more serious): "In this situation two different crimes are involved, and the lesser is not necessarily included in the greater, since it would be possible to commit the greater without also having committed the lesser." 2 Wright, *supra,* at 374-375.

The greater and lesser tax offenses involved in this case are Sections 7206(1) and 7207 of the Internal Revenue Code of 1954. Section 7206(1) makes it a felony willfully to make and subscribe, under the penalties of perjury, any return or other document without believing it to be true and correct as to every material matter. Section 7207 makes it a misdemeanor willfully to deliver or disclose any document known to be fraudulent or false as to any material matter. The offenses unquestionably differ in several respects. One obvious difference is that the felony requires that the document

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[8] The Court there further noted that this limitation on the lesser-included offense doctrine is especially appropriate in cases involving prosecutions for tax felonies which do not impose minimum penalties: "[t]he lack of minimum penalties * * * denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor." *Sansone* v. *United States, supra,* at 350, n. 6. Respondent was prosecuted under 26 U.S.C. 7206(1), which carries no minimum penalty.

be signed by the accused under the penalties of perjury, but the misdemeanor does not even require that the document be signed. See *Escobar* v. *United States,* 388 F. 2d 661, 666 (C.A. 5), certiorari denied, 390 U.S. 1024. This distinction, however, would not have supported a lesser included offense instruction in this case. Respondent properly conceded at trial (*e.g.,* Tr. 870) and in his brief below (at pp. 13-14), and the court of appeals recognized (455 F. 2d at 614, n. 3; Pet. App. 17, n. 3), that his income tax returns for the prosecution years had in fact been made and subscribed under the penalties of perjury.[4]

A

The court below also regarded the "willfulness" elements of the two statutes to reflect a distinction between them—and this raises the central dispute in this case. Respondent's requested lesser-included offense instructions (App., *infra,* pp. 25-26) had stated that the standard of willfulness for a misdemeanor conviction under Section 7207 is lower than that for a felony conviction under Section 7206(1) and could be satisfied by a finding that respondent was careless or capricious in filing tax returns actually known by him to be false as to material matters. The court of appeals, reasoning generally that the willfulness requirements of tax misdemeanors are lower than those of tax

[4] The offenses also differ in that, although the felony applies only to the person making and subscribing the document, the misdemeanor applies also to the person who delivers it. However, this further distinction between the offenses is not relevant to the present case.

felonies, held that the instructions should have been given. But this Court has not interpreted willfulness requirements on the basis of an arbitrary distinction between misdemeanors and felonies. The question properly turns on ascertaining what Congress intended to require in a particular statute when it has made "willfulness" an element of the crime. Proper construction must take account of the nature of the activities proscribed by the statute.

Thus, for example, in *Sansone* v. *United States*, 380 U.S. 343, the Court applied a volitional standard of conscious, deliberate intent under Section 7207. Such a standard is necessary in light of the statute's requirement of knowledge of falsity. The words "fraudulent" and "false" in Section 7207 imply not mere carelessness but design and intent to deceive. Thus respondent's instructions were properly denied by the district court for misstating the willfulness element of the lesser offense. But even if a volitional standard of careless or capricious behavior were deemed appropriate for Section 7207, there is in any event no basis for concluding that Section 7206(1) prescribes a higher standard of willfulness than does Section 7207. And if both statutes employ the same standard of willfulness, the misdemeanor cannot, under the facts of this case, be a lesser-included offense with respect to the felony.

B

Moreover, even if the standards of willfulness in the two statutes are different, the misdemeanor cannot in any event be considered a lesser offense *included* in the felony, for the lesser offense here contains an element

not found in the greater. The misdemeanor requires that the accused knew the statement was false, while the felony requires only that the accused did not believe the statement he made to be true. Knowledge of actual falsity is different from the lack of subjective belief of truthfulness. It requires an additional and different finding. Thus an instruction permitting conviction of the misdemeanor was not required by Rule 31(c), which speaks only of "an offense *necessarily included* in the offense charged * * *" (emphasis added). Furthermore, the lesser-included offense doctrine should not be extended to allow a jury to find an *additional* fact not material to the determination of a defendant's guilt of the offense charged, and then to dispense mercy by convicting him of a less serious offense on the basis of that finding.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT IT SHOULD FIND RESPONDENT GUILTY ONLY OF VIOLATING SECTION 7207 IF IT BELIEVED HE ACTED CAPRICIOUSLY OR CARELESSLY IN FILING RETURNS WHICH HE KNEW TO BE FALSE AS TO MATERIAL MATTERS.

The issue in this case is the soundness of the holding below that "it was error to reject an instruction embodying Section 7207, as a lesser included offense" (455 F. 2d at 615; Pet. App. 18). Our position is that all of respondent's proposed instructions on this point, and the somewhat different focus of the court of appeals, rest on a legally erroneous premise about the standard of willfulness in the two statutes.

Respondent tendered three proposed instructions set-

ting forth his theory as to why and how Section 7207 is a lesser offense included in Section 7206(1) (App., *infra,* pp. 25-26). One of these may be readily disposed of at the outset. Respondent's requested Instruction No. 29 would have charged the jury that "the specific evil purpose of misleading the Government with respect to the correct amount of tax due is required for conviction [under Section 7206(1)]." This instruction was plainly unwarranted as a misstatement of the elements of the felony offense for which respondent was being tried. It is not an element of the offense under Section 7206(1) that the false statement relate to the amount of tax due. Section 7206(1) merely proscribes the making of false declarations under the penalties of perjury, without regard to whether the declarant's tax liability has been misrepresented. *Sivaro* v. *United States,* 377 F. 2d 469 (C.A. 1). By offering Instruction No. 29, respondent was trying to raise the government's burden of proof to that required for a conviction under Section 7201 of the Code, which relates specifically to willful attempts to evade or defeat tax.[5] Therefore, even assuming the correctness of the decision of the court of appeals on the issue of the willfulness and the general

[5] In other words, the jury would have been led to believe under Instruction No. 29 that the government was required to show not only that respondent's statements of expenses were false but also that he had no other items of deduction which might have justified his reported tax liability.

Instruction No. 29 is also objectionable for misstating the degree of willfulness required for conviction of misdemeanors generally. As is discussed at pp. 14-17, *infra,* the court below in accepting this theory has erroneously held that the same willfulness standard applies to all tax misdemeanors.

propriety of a lesser-included offense instruction under the facts of this case, respondent's requested Instruction No. 29 was properly denied by the district court. We now turn to the principal issue, that of the meaning of willfulness in the two statutes.

A. Respondent's Requested Instructions Incorrectly Charged That the Willfulness Element of Section 7207 Is Lower Than That of Section 7206(1) and May Be Satisfied by a Finding That a Defendant Was Careless or Capricious In Filing a Tax Return Actually Known by Him To Be False As To Material Matters.

The crux of respondent's contention in this case is contained in the first paragraph of his requested Instruction No. 28:[6]

> If * * * you are convinced beyond a reasonable doubt that the defendant *knew the return to be false* as to a material matter, *and that he acted* with a bad purpose or *without reasonable cause, or capriciously, or with careless disregard,* but you are not satisfied beyond a reasonable doubt that he had formed the bad or evil purpose of misleading the Government, then you should find him guilty of the lesser offense of delivering a false return. [Emphasis added.]

Thus, the first issue in this case is whether the willfulness element of Section 7207 is lower than that in Section 7206(1) and may be satisfied by a finding that a defendant was careless or capricious in filing a tax

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[6] The principal statement in respondent's requested Instruction No. 27 was that the misdemeanor "required a lesser degree of willfulness" than the felony. This theme was amplified in Instructions 28 and 29.

return actually known by him to be false or fraudulent as to material matters.[7]

1. RESPONDENT'S PROPOSED INSTRUCTIONS AND THE DECISION OF THE COURT BELOW INCORRECTLY ASSUME THAT ALL TAX MISDEMEANORS INVOLVE A LOWER STANDARD OF WILLFULNESS THAN IS REQUIRED FOR CONVICTION OF A TAX FELONY.

The major premise underlying respondent's proposed instructions and accepted by the court of appeals is that tax misdemeanors necessarily involve a lower

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[7] Although the court below reversed because of the failure to give respondent's lesser-included offense instructions, accepting respondent's theory about the different levels of willfulness, the court focused explicitly on a different factual application than had respondent. While respondent talked about carelessness in filing a document known to be false, the court below stated that "[e]vidence under Section 7207 need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed" (455 F.2d at 615; Pet. App. 17). But this description of what would be sufficient to convict under Section 7207 cannot be reconciled with the statutory language. An element of the offense under Section 7207 is knowledge of the falsity of the statement submitted: the offense proscribed is the willful disclosure or delivery of any document "*known* by [the accused] to be fraudulent or to be false as to any material matter" (emphasis added). But the court below apparently would sustain the conviction under Section 7207 of one who had no knowledge of the falsity of his statement but had simply disregarded its truth or falsity through carelessness or capriciousness. In reading the requirement of knowledge of falsity out of the statute the court of appeals was clearly in error.

Although one who, acting with capricious disregard for the truth, had no knowledge of the falsity of his statement could not be guilty of violating Section 7207, he arguably could be guilty of violating Section 7206(1), which requires not knowledge of falsity but rather an absence of belief that the statement is true, if the statement is submitted under penalties of perjury. See *infra*, pp. 21-23.

standard of willfulness than do tax felonies.[8] This position is wrong.

In *Sansone* v. *United States,* 380 U.S. 343, a taxpayer was charged with the felony of willfully attempting to evade taxes in violation of Section 7201 of the Code. The taxpayer requested instructions that he could be acquitted of the felony charge but convicted of violating Section 7207, the misdemeanor offense also involved in the present case.[9] After finding that under the circumstances, the two statutes prohibited the same acts, the Court concluded (at 353):

> * * * [I]f, as the jury obviously found, *petitioner's act was willful in the sense that he knew that he should have reported more income than he did* * * * he was guilty of violating both §§ 7201 and 7207. If his action was not willful, he was guilty of violating neither. * * * [O]n the facts of this case, §§ 7201 and 7207 "covered precisely the same ground," * * * and thus petitioner was not entitled to a lesser-included offense charge based on § 7207. [Emphasis added.]

This Court in *Sansone* thereby determined that Congress has established the *same* volitional standard of

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[8] The court below stated categorically: "In income tax prosecutions this circuit has repeatedly interpreted the word 'willfulness,' as used in a misdemeanor statute, to mean something less than the same word 'willfulness' used in felony statute" (455 F.2d at 614; Pet. App. 16).

[9] The defendant in *Sansone* also requested a charge on another misdemeanor offense, Section 7203 of the Code. This Court concluded that the defendant was not entitled to instructions on either misdemeanor.

conscious, deliberate intent for both the felony of willfully attempting to evade tax and the misdemeanor of willfully filing a false statement. See *United States* v. *Vitiello,* 363 F. 2d 240, 243 (C.A. 3). By applying the same standard under both Section 7201 and Section 7207, this Court in *Sansone* foreclosed the general argument, relied upon by the court below, that tax felonies require a higher degree of willfulness than do tax misdemeanors.[10]

Moreover, the underlying rationale of the decision below, *i.e.,* that conscious intent is never a necessary element of a tax misdemeanor, conflicts with this Court's holdings in *United States* v. *Murdock,* 290 U.S. 389, and *Spies* v. *United States,* 317 U.S. 492. *Murdock* involved a prosecution for the misdemeanor of willful failure to supply information for purposes of the computation of a tax, in violation of a predecessor of Section 7203 of the Code, and this Court held that the requirement of willfulness in that misdemeanor statute made "bad faith or evil intent" (290 U.S. at 389) an element of the offense. Similarly, in *Spies* this Court insisted on "some element of evil motive" (317 U.S. at 498) as an element of the misdemeanor of willfully failing to pay a tax under Section 7203 of the Code.[11]

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[10] Respondent has argued (Br. in Opp. 3-4) that the Court in *Sansone* was merely holding that under the facts there the degree of willfulness necessary to establish a felony was present and that it was therefore unnecessary to decide whether a lower standard of willfulness applies to tax misdemeanors. But there is no suggestion in the Court's analysis that the standards of willfulness under the two statutes, although different, were both satisfied; to the contrary, the language of the opinion strongly implies that the standard of willfulness under each statute is the same.

[11] It should be noted that the willfulness standards set for the misdemeanors in *Murdock* and *Spies* are not lower—indeed, they may be higher—than that set for the felony in *Sansone.*

Thus, unlike the court below, this Court has not broadened the willfulness element of tax misdemeanors in general to embrace acts merely committed "without reasonable cause, or capriciously or with a careless disregard * * * *" (455 F. 2d at 614; Pet. App. 16-17, italics omitted). To the contrary, in *Spies* and *Murdock,* this Court held that the appropriate willfulness standards for the tax misdemeanors there in question were identical to those commonly used in other offenses involving turpitude. See, *e.g., United States* v. *Illinois Central R. Co.,* 303 U.S. 239, 242.

As the Court noted in *Spies,* "willful * * * is a word of many meanings, its construction often being influenced by its context." 317 U.S. at 497. Accordingly, when reviewing tax prosecutions this Court has interpreted willfulness requirements in light of the particular nature of the activities Congress sought to prohibit and not on the basis of an arbitrary distinction between misdemeanors and felonies.[12]

2. THE DEGREE OF WILLFULNESS REQUIRED FOR A CONVICTION OF THE MISDEMEANOR UNDER SECTION 7207 IS NO LESS THAN THAT REQUIRED FOR CONVICTION OF THE FELONY UNDER SECTION 7206(1) AND WOULD NOT BE SATISFIED BY A FINDING THAT A DEFENDANT WAS MERELY CARELESS OR CAPRICIOUS IN FILING A TAX RETURN ACTUALLY KNOWN BY HIM TO BE FALSE AS TO MATERIAL MATTERS.

As is discussed above (*supra,* pp. 15-16), this Court in *Sansone* applied the same volitional standard of conscious, deliberate intent for both the felony under

[12] For example, in *Spies,* where the Court had required "evil motive" for conviction of the misdemeanor of willfully failing to pay a tax, it approved "[m]ere voluntary and purposeful" (317 U.S. at 497-498) conduct as the standard of willfulness for the misdemeanor of willfully failing to file a return.

Section 7201 and the misdemeanor under Section 7207. There are two points to note in connection with this treatment of the issue of willfulness in *Sansone*. First, the misdemeanor which was involved there, Section 7207, is the same statute that respondent here sought to invoke in requesting lesser-included offense instructions. But respondent's requested instructions charged that the element of willfulness in that misdemeanor could be satisfied by a finding of carelessness or capriciousness. This charge is clearly inconsistent with the *Sansone* description of the word "willfully" in Section 7207 as being used "in the sense that [the accused] knew that he should have reported more income than he did" (380 U.S. at 353), and this inconsistency alone would have justified the district court's refusal of the requested instruction. Second, there is no basis in the language, history or purpose of Sections 7201 (the felony involved in *Sansone*) and 7206(1) (the felony of which respondent has been convicted) for concluding that the same word "willfully" describes a higher degree of volition in Section 7206(1) than in Section 7201. Therefore, if, as *Sansone* appears to hold, Sections 7201 and 7207 employ the same test of willfulness, so do Sections 7206(1) and 7207. And, as respondent concedes (Br. in Opp. 2), if the statutes here involved employ the same test of willfulness, the requested instructions were improper.

But respondent's instructions on the issue of willfulness were improper even without regard to *Sansone*. The offense proscribed by Section 7207 is that of willfully delivering or disclosing a statement "*known* * * * to be fraudulent or to be false as to any material mat-

ter" (emphasis added). Respondent's requested instructions, which would have charged the jury that he could be convicted of carelessly or capriciously filing a statement he knew to be false, essentially involve a contradiction in terms. The statutory requirement of knowledge of falsity cannot be sensibly reconciled with a volitional standard of mere carelessness or capriciousness. The words "fraudulent" and "false" imply not mere carelessness but design and an actual intent to deceive. See *Seven Cases* v. *United States*, 239 U.S. 510, 517. Those words denote intentional and deliberate untruth, something beyond mere accidental inaccuracy. *Heindel* v. *United States*, 150 F. 2d 493, 497 (C.A. 6); *United States* v. *Achtner*, 144 F. 2d 49, 52 (C.A. 2). In such a setting it is unreasonable to construe the word "willfully" as referring to careless or accidental conduct. Rather, in this context, "the word 'willfully' * * * must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress." *Hartzel* v. *United States*, 322 U.S. 680, 686.

The courts have refused to apply a volitional standard of mere carelessness even under Section 7203, relating to willful failure to file tax returns. *Spies* v. *United States, supra; United States* v. *Vitiello, supra; Haner* v. *United States*, 315 F. 2d 792 (C.A. 5). Such a standard would be even less appropriate under a statute like Section 7207 which requires knowledge of falsity or fraud. Furthermore, if respondent knew, as his requested instructions assume, that the tax returns which he prepared and filed contained false statements, it is not clear in what sense his submission of the false statements could ever be considered simply

negligent. In short, respondent's requested instructions did not describe a course of action which Congress could reasonably be deemed to have sought to prohibit under Section 7207, nor did they describe a hypothetical finding of fact which the jury might have reasonably made under the statute; the instructions were in fact nothing more than a disguised invitation to the jury to extend to respondent a leniency having no foundation in the statutory text.[13]

B. The Misdemeanor Under Section 7207 Is Not a Lesser Offense Included Within the Felony Under Section 7206(1), Because the Requirement of Knowledge of Falsity in the Misdemeanor Is Not an Element of the Felony.

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[13] There is a further reason why respondent was not entitled to a lesser-included offense instruction in this case. Even assuming, contrary to the above analysis, that Section 7207 may reach merely negligent conduct, there is no apparent basis for holding that the willfulness standard prescribed by Section 7206(1) would be any higher than that required for Section 7207. Indeed, the nature of the offenses suggests that if either statute proscribes mere negligent behavior, it is Section 7206(1) and not Section 7207. Section 7206 (1) relates to statements made under the penalties of perjury; the very existence of those penalties should suggest to the declarant the seriousness of the context in which his statements are made; if he nevertheless chooses to be careless or capricious in making statements without believing them to be truthful, he arguably does so at his own peril. Furthermore, a volitional standard of carelessness or recklessness is, if anything, easier to reconcile with Section 7206 (1), an offense involving statements made without regard to their truth, than with Section 7207, an offense of knowingly making false statements. Thus, if Section 7207 is to be construed as covering merely careless or capricious behavior, it would not be unreasonable to interpret Section 7206(1) in the same way. And if both statutes employ the same standard of willfulness, even if that be a standard of mere careless or capricious behavior, the misdemeanor cannot, under the facts of this case, be a *lesser*-included offense with respect to the felony.

Rule 31(c), upon which respondent relies, provides that "[t]he defendant may be found guilty of an offense *necessarily included* in the offense charged * * *" (emphasis added). This limitation of the rule to lesser offenses necessarily included within the offense charged reflects the historic origin of the lesser-included offense doctrine. That doctrine was "developed at common law to aid the prosecution in cases where the proof failed to show some element of the crime charged" (2 Wright, *supra,* at 372), and its present scope remains true to its original rationale.[14] Thus a lesser-included offense instruction may be given only where a conviction of the lesser offense may be supported on nothing more than a jury finding that the prosecution has succeeded in establishing some, but not all, of the elements of the greater offense. The lesser-included offense doctrine "does not apply if some element is required for the lesser offense but not for the greater." *Id.,* at 374.

The element of *scienter* in Section 7206(1), as in the statutory crime of perjury (18 U.S.C. 1621), is that of an absence of belief in the truth of the statements averred.[15] Thus it was necessary for the prosecution here to show not that respondent knew that his state-

[14] Of course, the application of the doctrine is often considered beneficial to, and may be invoked by, the defendant. See *Stevenson* v. *United States,* 162 U.S. 313.

[15] Indeed, the traditional view of the common law crime of perjury was that it could be committed by making a true statement if the declarant neither knew it was true nor had probable cause for believing it to be true. 3 Wharton, *Criminal Law* 653 (Anderson ed., 1957). Presumably this view stemmed from the fact that the crime of perjury was originally considered a moral crime or a crime of conscience. See Silving, *The Oath,* 68 Yale L. J. 1329, 1362-1363, 1365, 1381 (1959).

ments of expenses were false but that he did not affirmatively believe they were true.[16] A jury determination of actual falsity and of respondent's knowledge of such falsity was not material in this prosecution. By contrast, establishing knowledge of actual falsity is crucial in a prosecution under Section 7207. The latter statute bars disclosure only of documents "*known* * * * to be fraudulent or to be false" (emphasis added). Thus the lesser offense here contains an element—knowledge of falsity—not found in the greater.

The lesser-included offense doctrine should not be extended to permit instructions on additional factual questions, such as the existence of knowledge of falsity here, which need not be resolved in connection with the offense charged.[17] The lower courts have steadfastly refused to extend the doctrine in this way. For example, in prosecutions for serious drug offenses which may be committed either with or without possession of the illegal drug, defendants have been refused instructions on lesser possessory offenses. *Kelly* v. *United States,* 370 F. 2d 227 (C.A. D.C.), certiorari denied,

[16] This consideration lends support to the suggestion of the National Commission on Reform of Federal Criminal Laws that the proper volitional standard for such crimes is recklessness. See 1 National Commission on Reform of Federal Criminal Laws, *Working Papers* 660 (1970). The reckless assertion of facts not known to be true, with no reasonable cause for believing them to be true, is a proper subject for criminal sanction, especially in an area, such as the federal income tax laws, in which the government must rely primarily upon honest, candid, and cooperative self-reporting.

[17] It should be noted that since respondent denied any knowledge of falsity (*supra,* p. 5), we are not here confronted with a case where the additional element of the lesser offense has been conceded.

388 U.S. 913; *Waker* v. *United States,* 344 F. 2d 795 (C.A. 1). See, also, *Government of Virgin Islands* v. *Aquino,* 378 F. 2d 540 (C.A. 3); *James* v. *United States,* 238 F. 2d 681 (C.A. 9). In essence, respondent's requested instructions would have charged the jury to find a fact not properly in issue before it and then to dispense mercy, in the form of a conviction for a different crime, involving that new element, but carrying a lesser penalty. Such instructions distort the lesser-included offense doctrine and abuse the jury's proper function. A defendant has no right to insist on such a course, even though it might help him avoid being convicted as charged.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case remanded for

consideration of the other issues raised by respondent's appeal.

Respectfully submitted.

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NOVEMBER 1972.

APPENDIX

DEFENDANT'S REQUESTED INSTRUCTION No. 27

(Lesser-Included Offense)

A lesser included offense is an offense made up of some, but not all, of the elements of the offense charged. The crime of willfully delivering a false return includes the following elements:

(1) That the defendant filed the return; and
(2) That he knew it to be false as to a material matter.

It differs from the offense charged in the indictment in that:

(1) It does not require that the defendant willfully signed a declaration under penalty of perjury, and,
(2) It required a lesser degree of willfulness.

DEFENDANT'S REQUESTED INSTRUCTION No. 28

(Lesser-Included Offense)

If, as to any count, you are convinced beyond a reasonable doubt that the defendant knew the return to be false as to a material matter, and that he acted with a bad purpose or without reasonable cause, or capriciously, or with careless disregard, but you are not satisfied beyond a reasonable doubt that he had formed the bad or evil purpose of misleading the Government, then you should find him guilty of the lesser offense of delivering a false return.

Similarly, if you are convinced beyond a reasonable doubt both that he knew the return to be false as to a material matter and that he had formed the bad or evil purpose of misleading the Government, but you are not satisfied beyond a reasonable doubt that he knew the return contained a declaration that it was made under the penalties of perjury, you should find him guilty of the lesser offense of delivering a false return.

In other words, you should find the defendant guilty of the lesser offense if you have a reasonable doubt either that the defendant knew that what he signed contained a declaration under penalty of perjury, or that he acted with the

specific evil purpose of misleading the Government, but you are satisfied beyond a reasonable doubt as to every other element of the offense as I have described it to you.

DEFENDANT'S REQUESTED INSTRUCTION No. 29

(Willfulness and Misdemeanors)

The offense charged, willfully making a false return under penalty of perjury, is a felony; whereas the lesser offense of willfully delivering a false return is a misdemeanor. The word willful, as used in misdemeanors, means with a bad purpose or without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act. That the defendant formed the specific evil purpose of misleading the Government with respect to the correct amount of tax due is required for conviction of the felony charged, but it is not required for conviction of the lesser misdemeanor offense of delivering a false return.

☆ U.S. Government Printing Office: 1972—489-427/322

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, *Petitioner*

vs.

CECIL J. BISHOP

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Does the word "willfully" mean something less in Section 7207[1] of the Internal Revenue Code, a mis-

[1]Internal Revenue Code of 1954 (26 U.S.C.):
Section 7207 [as amended by Sec. 7 Self-Employed Individuals Tax Retirement Act of 1962, P.L. 87-79, 76 Stat. 809].
Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. * * *

demeanor, than the same word in Section 7206(1)[2] of that Code, a felony, so that taxpayer was entitled to a lesser included offense instruction?

STATEMENT

Cecil J. Bishop ("the taxpayer") was convicted after trial by jury in the United States District Court for the Eastern District of California on a three count indictment[3] charging violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) for 1963, 1964, and 1965 (App. 5-7, 31-32.) Taxpayer is an attorney practicing in Sacramento, California, and during the indictment years he also operated a walnut ranch near Red Bluff, California. (Tr. 895-896)[4]. Louise Bishop is the taxpayer's stepmother and she also managed the walnut ranch. (Tr. 897.)

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[2]Internal Revenue Code of 1954 (26 U.S.C.):

Section 7206.

Any person who—

(1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter,

* * *

shall be guilty of a felony and, upon conviction thereof shall be fined not more than $5,000, or imprisoned not more than three years, or both, together with the costs of prosecution.

[3]Although the indictment was returned in the Northern District of California, the case was transferred to the Eastern District of California for trial.

[4]"Tr." references are to the trial transcript.

The taxpayer sent weekly checks to Louise Bishop to pay ranch expenses and, in addition, paid other ranch expenses directly by check. All checks were drawn on a single checking account, which the taxpayer used for both his law practice and his personal expenses. (Tr. 487.) At the end of each year, one of the secretaries in the taxpayer's law office prepared a schedule classifying all checks issued according to type of expenditure. The taxpayer attached such a schedule (which he identified as Schedule A) to his return for each of the years in question, and he deducted as farm expenses the total of the checks classified by his secretary as "Farm". (Pl. Ex. 1, 2, and 3, Tr. 63)[5].

Following the end of each indictment year, Louise Bishop handed the taxpayer a schedule of ranch expenditures for the year. (Tr. 912, 913, 916, 917.) Nowhere did Mrs. Bishop attempt to reconcile the total expenditures listed in her schedules with the total funds provided by the taxpayer, and the taxpayer testified that he believed that Louise Bishop's schedule for 1963 represented expenditures advanced by her from her own funds, in addition to the funds he had provided. (Tr. 910, 911.) In preparing his 1963 return, therefore, he attached a copy of Louise Bishop's schedule (which he identified as Schedule B), and he deducted as farm expenses the total of the checks listed on that schedule in addition to the total of the checks classified as "Farm" on the schedule prepared

[5]"Pl. Ex." references are to the Government's exhibits introduced at trial.

by his secretary. In fact, this resulted in duplication of expenses deducted.[6]

Among the taxpayer's checks for the year 1963 which his secretary classified as "Farm", and which were included in his Schedule A, were certain loan repayments to Bank of America which were not properly deductible. The similar schedules for the years 1964 and 1965 likewise included some nondeductible expenditures which were classified by the taxpayer's secretary as "Farm" and incorrectly included in the total amount deducted as farm expenses. These nondeductible items are conveniently identified and summarized in the trial court's instructions to the jury. (App. 19-21.)

While the prosecution and the defense did not agree upon the amount by which farm expenses had been overstated for any of the three years, the defense acknowledged that there had been some overstatement. The primary thrust of the defense was that while the returns may have been incorrect, the errors were not intentional on the part of the taxpayer. The taxpayer testified that when he filed the returns he was unaware of the errors. The Government attempted to rebut this evidence through the testimony of the ranch manager and by attempting to show a pattern of incorrect returns. Willfulness thus became

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[6]The Government incorrectly states in its brief that such duplication of expenses occurred in each of the indictment years. The Government's exhibits (Pl. Ex. 1, 2 and 3, Tr. 63) clearly show, however, that there was no duplication in any indictment year other than 1963, and the trial court's instructions to the jury likewise make this clear (App. 19-21).

a critical issue in the case, and it was in this setting that the taxpayer requested lesser included offense instructions.

The taxpayer requested that the jury be given instructions permitting it to find him guilty of violation of Section 7207 of the Internal Revenue Code of 1954 (26 U.S.C.), a misdemeanor, as a lesser included offense within Section 7206(1) of that Code, a felony. The District Court refused to give the requested instructions and the taxpayer was convicted of the felony offense for each of the three years. He appealed, urging as error the failure to give the requested instructions and the admission of certain evidence at trial. The Court of Appeals reversed on the lesser included offense issue and did not reach the question of admission of evidence. Thereafter the Government petitioned this Court for certiorari, and the petition was granted.

SUMMARY OF ARGUMENT

The word "willfully" as used in Section 7207 denotes a lower level of culpability than that denoted by the same word as used in Section 7206(1). Since the elements of the misdemeanor defined by Section 7207, when applied to income tax returns, are otherwise the same as the elements of the felony defined by Section 7206(1), Section 7207 is a lesser included offense under Section 7206(1). The taxpayer was therefore entitled to have the jury so instructed, and

the trial court's failure to give such an instruction was reversible error.

There are at least three distinct lines of cases defining willfulness in tax misdemeanors. The Third and Fifth Circuits define the term to require bad faith or evil motive, as in felony cases. The Ninth Circuit holds that the requirement in misdemeanor cases is met by a showing that a taxpayer's action is unreasonable, capricious or exhibits careless disregard toward his tax obligation. The First and Seventh Circuits take a middle course, holding that while mere negligence or capriciousness is insufficient to constitute willfulness, it is not necessary to show bad faith or evil motive.

If, in this context, willfulness is a word of more than a single meaning, as the taxpayer contends, then the action of the Court of Appeals must be sustained, whether this Court adopts the Ninth Circuit view or the position taken by the First and Seventh Circuits. Under either of those views, there was in this case a factual dispute as to the degree of willfulness which the jury should have been allowed to resolve.

Our position that "willfully" has more than one meaning avoids interpreting these felony and misdemeanor sections as covering precisely the same ground. It is also consistent with the lower standard of willfulness generally required for purely statutory misdemeanors. Finally, the existence of a statutory hierarchy of tax offenses strongly suggests that the willfulness required for a tax misdemeanor is of a lesser degree than that required for a felony.

The Government directs its argument primarily to the correctness of the instructions requested by the taxpayer, rather than to the charge actually given by the trial court. But even if the instructions requested by the taxpayer were incorrect, he may nevertheless challenge his conviction on appeal, since the issue on appeal is the correctness of the instructions actually given.

The other arguments advanced by the Government are equally unpersuasive. Although it urges that this Court held in *Sansone* that willfulness invariably has the same meaning in tax misdemeanors as in tax felonies, it conceded the contrary in *Ming v. United States*. Moreover, a minor difference in the wording of the two sections, to which the Government points, does not create a difference in the factual elements included in the two offenses.

The taxpayer's position is legally correct and it provides a proper framework within which the jury can resolve the disputed facts of the case. The Government's position is legally incorrect and inconsistent with the jury's central role in our jurisprudence.

ARGUMENT

THE WORD "WILLFULLY" AS USED IN SECTION 7207 OF THE INTERNAL REVENUE CODE MEANS SOMETHING LESS THAN THE SAME WORD AS USED IN SECTION 7206(1) OF THAT CODE. THEREFORE THE TAXPAYER IN THE INSTANT CASE WAS ENTITLED TO AN INSTRUCTION THAT SECTION 7207 IS A LESSER INCLUDED OFFENSE WITHIN SECTION 7206(1).

This case presents the single issue of whether the misdemeanor section (7207) is a lesser included offense within the felony section (7206(1).) The resolution of this question depends in turn upon whether the culpability requirement in the felony section is greater than that in the misdemeanor section.

I

WHEN A LESSER INCLUDED OFFENSE INSTRUCTION IS APPROPRIATE

Rule 31(c) of the Federal Rules of Criminal Procedure provides in pertinent part that, "The defendant may be found guilty of an offense necessarily included in the offense charged * * *." This rule is a restatement of existing law[7] and embodies two alternative approaches[8], which may be identified, respectively, as (a) the common law or *necessarily* included offense formulation, and (b) the more modern cognate or *lesser* included offense formulation. Courts gener-

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[7]Notes of Advisory Committee on Rules, Note to Rule 31, Subdivision (c); 2 Wright, *Federal Practice and Procedure: Criminal* §515.

[8]*Olais-Castro v. United States*, 416 F. 2d 1155, 1157 (C.A. 9, 1969).

ally accept both versions of the rule. *Olais-Castro v. United States, supra,* at 1157; Comment, *Jury Instructions on Lesser Included Offenses,* 57 Nw. U.L. Rev. 62, 62-63 (1962).

Common to both approaches is the proposition that a lesser included offense is made out where some, but not all, of the elements of the offense charged themselves constitute a lesser offense, provided, however, that the jury must be able to find a disputed factual element required for the greater offense which is different from or not included in the lesser offense. *Sansone v. United States,* 380 U.S. 343, 349-350 (1965); *Berra v. United States,* 351 U.S. 131, 134 (1956); Wright, *Federal Practice: Criminal, supra;* 8 Moore's *Federal Practice* (2d ed.) ¶31.03. The introduction of any evidence tending to prove the disputed factual element requires the giving of the lesser included offense instruction. *Stevenson v. United States,* 162 U.S. 313, 314 (1896).

The common law or *necessarily* included offense formulation requires, in addition, that for a lesser included offense instruction to be given, it must be impossible to commit the greater offense without committing the lesser. This is the doctrine which the Government urges. (Br. 8.) The cognate or *lesser* included offense doctrine, however, requires only that the elements of both offenses be cognate or overlapping.

The modern view is that a lesser included offense instruction is appropriate where there is an inherent relationship between the greater and lesser offense,

i.e., both offenses must relate to the protection of the same interests and usually, although not invariably, proof of the lesser offense is presented as part of the proof of the greater offense. *United States v. Whitaker,* 447 F.2d 314, 319 (C.A.D.C., 1971); American Law Institute, *Model Penal Code* (Proposed Official Draft, May 4, 1962), Section 1.07.

We intend to show that a lesser included offense instruction was appropriate in this case under either formulation of the rule.

II

ANALYSIS OF OFFENSES INVOLVED

a. History

Section 7206 has a sparse legislative history. The section was enacted to consolidate in one section and to make generally applicable to certain taxes, including income taxes, various penal provisions relating to fraud and false statements. The first subsection of that section, the felony here involved, was derived from Section 3809(a) of the Internal Revenue Code of 1939. S. Rep. No. 1622, 83d Cong. 2d Sess., 147 (3 U.S. Cong. & Admin. News (1944) 5252.) Section 3809(a) itself had drawn together a number of sections dealing with false returns. Compare Act of August 27, 1949, c. 517, 63 Stat. 666, Secs. 4(a) and 4(b).

Section 7207, the misdemeanor here involved, has a long and varying history. This Court traced that history in *Achilli v. United States,* 353 U.S. 373, 376-

379 (1957) and later in *Sansone v. United States,* 380 U.S. pp. 347-349 (1965). As those cases indicate, the section and its predecessors have gone through three evolutionary periods. The section was initially enacted in 1798 prior to the enactment of the first income tax law. It later became applicable to the two income tax statutes enacted prior to *Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 601 (1895). Following *Pollock* and the passage of the Sixteenth Amendment, new legislation[9] was enacted which contained specific penal provisions applicable to the income tax. This new statute accomplished a *pro tanto* repeal of the then equivalent of Section 7207 as it applied to income tax. *Achilli v. United States,* 353 U.S., p. 376. Later reenactments, culminating in Section 3616(a) of the Internal Revenue Code of 1939 continued this *pro tanto* repeal. *Achilli v. United States,* 353 U.S., pp. 376-379. As this Court pointed out in *Sansone,* 380 U.S., p. 348, the conclusion that Section 3616(a) and its predecessors (misdemeanor sections) were repealed as to income tax was compelled by the fact that those sections covered precisely the same ground as the predecessor of Section 7201 of the 1954 Code (a felony section) which was applicable to income tax, and this Court was unwilling to presume that Congress intended to enact the same provision applicable to income tax as both a felony and a misdemeanor.

In enacting the Internal Revenue Code of 1954, Congress made major changes in Section 7207. In

[9]Section II of the Revenue Act of 1913, 38 Stat. 114, 166.

addition to changing the placement and numbering of the section, Congress deleted the requirement that the filing of a false or fraudulent return be made "with intent to defeat or evade" tax. Also, such filing was explicitly required to be "willful". The net effect of these changes was to make the section applicable once again to income tax. *Sansone v. United States,* 380 U.S., p. 349.

b. Elements of the Two Offenses

The elements of Section 7206(1) are (1) filing a return known[10] to be false, (2) that the return be signed under penalty of perjury, and (3) willfulness. 10 Mertens, *Law of Federal Income Taxation* (Rev.) §55A. 13, pp. 68-69. The elements of Section 7207 are (1) filing a return known to be false, and (2) willfulness. *Sansone v. United States,* 380 U.S., p. 352. 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* (2d ed.) §52.24 (1970). As Section 7207 applies to income tax returns, other provisions of the law supply the additional requirement that the return be signed under penalty of perjury.[11]

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[10]The statute uses the word "believe" rather than "know". See discussion *infra* where we point out that the difference between these two words creates no new factual element.

[11]Section 6065(a) of the Internal Revenue Code of 1954 requires that any return or other document required to be filed under any provision of the Internal Revenue Code be executed under the penalties of perjury unless otherwise provided by the Secretary or his delegate. Individuals such as the taxpayer are required to use Form 1040 for their income tax returns. Treasury Regulations on Income Tax (1954), §1.6012-1(a)(6) (26 C.F.R.). Form 1040 contains a printed declaration that it is executed under penalties of perjury. (Pl. Ex. 1, 2, and 3, Tr. 63). Therefore, if a false return is filed, it must be filed under penalties of perjury for the purposes of both Sections 7206(1) and 7207.

From a comparison of the two sections here in question, it is apparent that the elements of both are the same (as applied to income tax returns) unless "willfully" is a word of more than one meaning in the context of these sections. If "willfully" has the same meaning in both sections, a lesser included offense instruction is not appropriate, since there is then no disputed factual element required for the greater offense which is different from that required for the lesser offense. If "willfully" means something less in the misdemeanor section than in the felony section, a lesser included offense instruction is required.

III

A LESSER INCLUDED OFFENSE INSTRUCTION IS REQUIRED IN THIS CASE

As has been said may times, willful is a word of many meanings. At the present time, there are at least three, and possibly four, definitions of the term as applied to tax misdemeanors.[12] *United States v. Lachmann*, 72-2 U.S.T.C., ¶9766 (C.A. 1, November 29, 1972). Many of these cases are collected in 22 A.L.R. 3d 1173.

The Third and Fifth Circuits define "willful" in tax misdemeanor cases to have the same meaning as

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[12]Most of the decided cases in this area involve Section 7203. The reason for the paucity of cases dealing with Section 7207 is that until the decision in *Sansone*, the Government took the position that Section 7207 did not apply to income tax returns and this offense was therefore not charged in income tax cases. See *Achilli v. United States*, 353 U.S., p. 375. The Government apparently recognizes the relevance of cases decided under Section 7203 (Br. 19).

in tax felony cases, i.e. requiring bad faith or an evil motive. Third Circuit: *United States v. Vitiello,* 363 F. 2d 240 (1966); *United States v. Palermo,* 259 F. 2d 872 (1958); *United States v. Litman,* 246 F. 2d 206 (1957); *United States v. Kahriger,* 210 F. 2d 565 (1954) (Sections 3290 and 3291 of the Internal Revenue Code of 1939). Fifth Circuit: *Haner v. United States,* 315 F. 2d 792 (1963). But cf. *McBride v. United States,* 225 F. 2d 249 (1955). It is this bad faith or evil motive definition which the trial court adopted in the instant case (App. 17).

The Ninth Circuit defines the willfulness required for tax misdemeanors as something less than that required for tax felonies. (455 F. 2d 612, 614; Pet. 16.) Under the Ninth Circuit definition, the requirement of willfulness in a tax misdemeanor case is met by a showing that the taxpayer's action is unreasonable, capricious or exhibits careless disregard concerning his tax obligation. (455 F. 2d at 615; Pet. 16; *Abdul v. United States,* 254 F. 2d 292 (C.A. 9, 1958), after remand 278 F. 2d 234 (1960), certiorari denied 364 U.S. 832.)

The third group of cases, decided in the First and Seventh Circuits, constitutes a middle ground between the bad faith or evil motive test of the Third and Fifth Circuits and the test adopted by the Ninth Circuit. Cases in this third group hold that the Government need not show bad faith or an evil motive in tax misdemeanor prosecutions, but they reject the proposition that negligence or capriciousness is sufficient to prove willfulness in such cases. *United States*

v. Lachmann, supra; United States v. Ming, 466 F. 2d 1000 (C.A. 7, 1972), certiorari denied 93 S. Ct. 235; *United States v. Matosky,* 421 F. 2d 410 (C.A. 7, 1970), certiorari denied 398 U.S. 904; *United States v. Fullerton,* 189 F. Supp. 211 (Md., 1960). The Government nowhere mentions this third line of cases in its brief, and it is not clear from its brief which line of authority it supports.

The Government has consistently taken the position in the Ninth Circuit that the standard of willfulness required for conviction of willful failure to file a return under Section 7203 of the Internal Revenue Code (a misdemeanor) is less than that required for conviction of attempted tax evasion under Section 7201 (a felony). Moreover, in *Abdul* and subsequent cases decided by the Ninth Circuit the Government has consistently (and successfully) resisted appeals in that circuit by taxpayers convicted under Section 7203 where the trial court's instructions to the jury defined willfulness in terms of conduct that was "unreasonable", or "capricious", or evidenced "careless disregard", the precise words to which the Government now objects so strenuously. The Government has, moreover, opposed review by this Court in such cases where the taxpayer petitioned for certiorari. *Abdul v. United States, supra; United States v. Fahey,* 411 F. 2d 1213, cert. den. 396 U.S. 957 (C.A. 9, 1969).

In his Brief in Opposition in *Abdul v. United States* (October Term, 1960, No. 104), the Solicitor General states (pp. 4-5):

> Despite the petitioner's assertion to the contrary (Pet. 20-29), the element of willfulness in the context of charges of failure to file tax returns [a misdemeanor] need not be defined in the precise terms of "evil motive * * * bad faith or evil intent." In *Spies v. United States* 317 U.S. 492, 497-498, this Court, differentiating between the meaning of willfulness in connection with misdemeanor and felony charges, pointed out that "[m]ere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness," where the charge involved a failure to file.

See also Brief for the United States in Opposition in *Fahey v. United States,* (October Term, 1969, No. 576) at pp. 7-8.

Briefly stated, our position here is that willfulness means something less in Section 7207 than in Section 7206(1). If we are correct in that assertion, the decision of the Court of Appeals must stand whether this Court adopts the Ninth Circuit view or the position taken by the First and Seventh Circuits. This result must follow because under either of these views there is a disputed factual element required for the greater offense which is different from that required for the lesser offense.

In interpreting the meaning of willfulness, this Court's duty is "to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation." *Achilli v. United States,* 353 U.S., p. 379. In so doing, the Court has stated that it is "unwilling to presume that Congress intended to enact

both felony and misdemeanor provisions which completely overlap in this important area." *Sansone v. United States*, 380 U.S., p. 348. Since the elements of the two sections overlap when applied to income tax offenses, our interpretation of the meaning of willfulness provides the requisite coherence to the statutory provisions in question and avoids the result which this Court has sought to avoid. That interpretation represents the only reasonable explanation of the statutory pattern which Congress has constructed. *United States v. Bysozoski*, 144 F. Supp. 806, 808 (N.J., 1956).

Culpability is not a unitary concept, but involves several identifiable levels, including negligence, recklessness, knowledge, and purpose. To fix the level of culpability in any crime requires reference to the intent of Congress, taking into account constitutional considerations as well as the common law background, if any, of the crime involved. *United States v. Freed*, 401 U.S. 601, 613-614 (1971) (concurring opinion by Mr. Justice Brennan). See American Law Institute, *Model Penal Code* (Proposed official draft, May 4, 1962), Section 2.02 and comments thereon contained in Tentative Draft No. 4, April 25, 1955, par. 10.

The intent of Congress seems clear in fixing the level of culpability in Section 7207. By enacting Section 7201, Congress effected a *pro tanto* repeal of the predecessor of Section 7207 as applied to income tax prosecutions, since both sections contained the same elements. Thereafter Congress, in once again making Section 7207 applicable to income tax prosecutions,

eliminated the requirement of intent to defeat or evade taxes, words associated with evil motive, and added the word "willfully". Should we now conclude that Congress eliminated a duplication between Section 7207 and one felony section (Section 7201) only to create a duplication between Section 7207 and another felony section (Section 7206(1))? We think not. Rather, by eliminating words denoting evil motive and inserting "willfully", Congress must have intended that the willfulness requirement of Section 7207 be satisfied by something less than an evil motive.

The lack of common law background of Section 7207 is also significant. Because tax misdemeanors are purely statutory and have no common law background, they should logically be grouped with other purely statutory misdemeanors, each of which requires a low standard of culpability.[18] A brief sampling of such misdemeanors is provided by the following cases: *Riss & Company v. United States,* 262 F. 2d 245 (C.A. 8, 1958) (Interstate Commerce Act); *Trenton Chemical Co. v. United States,* 201 F. 2d 776 (C.A. 6, 1953), certiorari denied 345 U.S. 994 (Grain Conservation Order of War Powers Act); *Nabob Oil Co. v. United States,* 190 F. 2d 478 (C.A. 10, 1951) (Fair Labor Standards Act); *United States v. Perplies,* 165 F. 2d 874 (C.A. 7, 1948) (OPA violation);

[18]The Government's argument that Section 7206(1) *does* have a common law background (Br. 21-22), if correct, would furnish a reason for the higher requirement of willfulness in Section 7206(1) in contrast to Section 7207, which has no such background.

United States v. Eastern Airlines, 192 F. Supp. 187 (S.D. Fla. 1961) (Violation of Civil Aeronautics Board Order).

Finally, the existence of a hierarchy of tax offenses strongly suggests that willfulness in a tax misdemeanor is of a different quality from that required for a felony. *Spies v. United States, supra.*

The Government argues (Br. 18-20) that even if the degree of willfulness required under Section 7207 is not identical with that required under Section 7206(1), the standard spelled out in the instruction requested by the taxpayer was wrong because it would permit the jury to convict under Section 7207 upon a showing of mere carelessness, and that it was therefore not error to refuse to give those instructions. But even assuming that the instructions requested by the taxpayer were incorrect in that respect, it does not follow that he is thereby foreclosed from challenging his conviction on appeal. Such an argument betrays a misunderstanding of the framework within which appellate courts examine a jury charge.

Under Rule 30, Federal Rules of Criminal Procedure, "No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" (Emphasis added.) The rule permits, but does not require, a party to request specific instructions that correct the error in the instructions given or supply those that have been omitted.

The rule is aptly summarized in 8 Moore's *Federal Practice* (2d ed.) ¶30.04, page 30-11 as follows: "In determining the overall propriety of instructions, an appellate court focuses not on the correctness of the requests, but on the correctness of the charge itself." Indeed, a party making a timely objection to a jury charge need not file any requested instruction in order to have the correctness of the charge considered on appeal. *United States v. English,* 409 F. 2d 200 (C.A. 3, 1969).

The objection made by the taxpayer in the trial court (App. 28) embodies exactly and succinctly the position urged by him in this court.

Therefore, if the trial court's charge was erroneous for the reason stated in the objection, the action of the Court of Appeals in reversing his conviction was clearly proper, whether or not his requested instructions correctly stated the law.

A question is raised at this point as to the correct interpretation of this Court's decision in the *Sansone* case. The Government argues that *Sansone* holds that willfulness invariably has the same meaning in tax misdemeanors as in tax felonies, thereby foreclosing our argument to the contrary (Br. 15-16). We argue that *Sansone* embodies only a factual analysis and a holding that the facts there present were insufficient to vitiate willfulness required for a conviction of either a felony or a misdemeanor.

In *United States v. Ming, supra,* the taxpayer was convicted of violating Section 7203, a misdemeanor. The taxpayer petitioned this Court for certiorari on

the ground, among others, that "willfully" has the same meaning in Section 7203 as in the felony sections, relying on *Sansone*. (Petition for Writ of Certiorari, October Term, 1972, No. 72-152, pp. 13, 15-17.) The Government replied (Brief for the United States in Opposition p. 6):

> Petitioner is mistaken in suggesting (Pet. 15-17) that *Sansone* supports his criticism of the jury instruction here involved. The portion of the *Sansone* opinion which petitioner quotes (Pet. 15-16) demonstrates merely that, on the facts of a particular case, there may be violations of both Sections 7201 and 7203, with no differentiating fact to be found by the jury (and hence no need for a lesser included instruction).

We believe that the Government's analysis in *Ming* sufficiently answers its contrary assertion here.

A subsidiary argument urged by the Government is that Section 7207 cannot be a lesser included offense of Section 7206(1), since the former section punishes the filing of a return "known" to be false while the latter section punishes a return believed to be false. (Br. 20-22.) If we accept the argument that these two similar words signify different factual elements in the offenses in which they appear, we have the curious result that filing a return which the taxpayer merely believes to be false is punished more severely than filing a return which he knows to be false.

The Government argues for this result on grounds that the special requirements of the general perjury statute (18 U.S.C. §1621), including specifically a

special meaning of belief, are imported into Section 7206(1). This is patently erroneous. In *Escobar v. United States,* 388 F. 2d 661 (C.A. 5, 1967), certiorari denied 390 U.S. 1024, the case upon which the Government placed primary reliance in both courts below, the court stated (p. 664):

> The statute [Section 7206(1)] does *not* say that one who willfully makes a false return "shall be guilty of perjury." In fact, it contains no language indicating that the crime of perjury is involved at all. The language "made under penalties of perjury" is of purely historical significance.

Moreover, if the Government were correct in arguing that each element of perjury is present in Section 7206(1), then the willfulness requirement of bad faith or evil motive, which is absent from the general perjury statute,[14] would likewise be absent from Section 7206(1). This, of course, is contrary to the Government's primary argument.

We conclude, therefore, that the use of the word "believe" in Section 7206(1) does not create a factual element different from that created by the use of the word "known" in Section 7207, and that the two words as used in these sections should be given the same meaning.

Finally, the Government contends that the lesser included offense instruction allows the jury to dispense mercy and frustrates the prosecutor's discretion.

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[14] *Maragon v. United States,* 187 F. 2d 79, 80 (C.A.D.C., 1950), certiorari denied 341 U.S. 932.

(Br. 8, 20, 23.) This assumes that the jury will disregard evidence requiring conviction of a felony in order to convict only of a misdemeanor. As the Court said in *United States v. Whittaker*, 447 F. 2d at 321:

> If the evidence is such that a jury can rationally—and is likely—to choose the lesser offense, then the interests of justice call for the defense to have the option of the lesser included offense—whether the prosecution chose to put it in the indictment or has the right later to request it or not. This recognizes "the jury's central role in our jurisprudence," and if the jury errs too obviously on the side of mercy instead of justice in determining the offense, the trial judge may be in position to restore some balance at the time of sentencing.

In this case the jury could have found from the evidence (a) that the taxpayer's false returns were filed with an evil motive, and could therefore have convicted him of a felony under Section 7206(1), or (b) that the returns were filed intentionally but without an evil motive, warranting conviction of a misdemeanor under Section 7207, or (c) that they were filed without knowledge of their falsity, thus warranting acquittal. In the name of prosecutorial discretion the Government would deprive the jury of the right to make the second finding. Such a result would be legally incorrect and inconsistent with the jury's central role in our jurisprudence.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December, 1972

Slip Opinion

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* BISHOP

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–1698. Argued January 16, 1973—Decided May 29, 1973

Respondent was convicted of violating 26 U. S. C. § 7206 (1), which makes it a felony when one "[w]illfully makes and subscribes any return . . . which he does not believe to be true and correct as to every material matter," after the District Court refused a lesser-included-offense jury charge under § 7207, which makes it a misdemeanor when one "willfully delivers or discloses" to the Internal Revenue Service any return or document "known by him to be fraudulent or to be false as to any material matter." The Court of Appeals reversed on the ground that "willfully" as used in § 7206 implied an evil motive and bad faith, but the same word as used in § 7207 required only a showing of unreasonable, capricious, or careless disregard for the truth. *Held:* The word "willfully" has the same meaning in §§ 7206 (1) and 7207, connoting the voluntary, intentional violation of a known legal duty, and the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence, the District Court properly refused the requested lesser-included-offense instruction based on respondent's erroneous contention that the word "willfully" in the misdemeanor statute implied less scienter than the same word in the felony statute. Pp. 4–16.

455 F. 2d 612, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement.

SUPREME COURT OF THE UNITED STATES

No. 71-1698

United States, Petitioner, v. Cecil J. Bishop. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Chapter 75, subchapter A, of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 7201–7241, is concerned with tax crimes. Sections 7201–7207, inclusive, which in the aggregate relate to attempts to evade or defeat tax, to failures to act, and to fraud, all include the word "willfully" in their respective contexts. Specifically, § 7206 is a felony statute and reads:

"§ 7206. Fraud and false statements.

"Any person who—

"(1) Declaration under penalties of perjury.

"Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . .

. . . . . .

"shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Section 7207 is a misdemeanor statute [1] and reads:

> "7207. Fraudulent returns, statements, or other documents.
>
> "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both . . . ."

This case presents the issue of the meaning of the critical word "willfully" as it is employed in these two successive statutes. Is its meaning the same in each, or is the willfulness specified by the misdemeanor statute, § 7207, of somewhat less degree than the felony willfulness specified by § 7206?

I

Respondent, Cecil J. Bishop, was convicted by a jury on all three counts of an indictment charging him with felony violations of § 7206 (1) with respect to his federal income tax returns for the calendar years 1963, 1964, and 1965. The Court of Appeals, holding that a lesser-included-offense instruction directed to the misdemeanor statute, § 7207, was improperly refused by the trial judge, reversed the judgment of the District Court and remanded the case for a new trial. 455 F. 2d 612 (CA9 1972). Since the meaning of "willfully," as used in the

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[1] 18 U. S. C. § 1 defines felony and misdemeanor:

"§ 1. Offenses classified.

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor."

tax crime statutes, has divided the circuits,[2] we granted certiorari. 409 U. S. 841 (1972).

We conclude that it was proper and correct for the District Court to refuse the lesser-included-offense instruction. In our view, the word "willfully" has the same meaning in both statutes. Consequently, we reverse and remand so that the Court of Appeals may now proceed to consider the additional issues that court found it unnecesary to reach.

II

Mr. Bishop is a lawyer who has practiced his profession in Sacramento, California, since 1951. During that period, he owned an interest in a walnut ranch he and his father operated. In 1960 his secretary, Louise, married his father. The father died, and thereafter respondent's stepmother managed the ranch.

Respondent periodically sent checks to Louise. These were used to run the ranch, to pay principal on loans, and to make improvements.

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[2] Compare *United States* v. *Vitiello*, 363 F. 2d 240, 243 (CA3 1966) (§§ 7201 and 7203), and *Haner* v. *United States*, 315 F. 2d 792, 794 (CA5 1963) (§ 7203), where the Ninth Circuit analysis was rejected, with *United States* v. *Fahey*, 411 F. 2d 1213 (CA9), cert. denied, 396 U. S. 957 (1969) (§ 7203); *Martin* v. *United States*, 317 F. 2d 753 (CA9 1963) (§ 7203); *Abdul* v. *United States*, 254 F. 2d 292 (CA9 1958) (§§ 2707 (b) and (c) of the 1939 Code and §§ 7202 and 7203 of the 1954 Code). See also *Janko* v. *United States*, 281 F. 2d 156, 166–167 (CA8 1960), reversed on confession of error by the Solicitor General, 366 U. S. 716 (1961) (§§ 7201 and 7207); *Lumetta* v. *United States*, 362 F. 2d 644, 646 n. 3 (CA8 1966) (§§ 7201 and 7203); *Escobar* v. *United States*, 388 F. 2d 661 (CA5), cert. denied, 390 U. S. 1024 (1968) (§§ 7206 (1) and 7207). Other inconsistencies in interpreting the word "willfully" have compounded the confusion. See n. 8, infra. Cf. *United States* v. *Lachmann*, 469 F. 2d 1043 (CA1 1972) (§§ 7201 and 7203).

Louise maintained a record of ranch expenditures and submitted an itemized list of these disbursements to respondent at the end of each calendar year. In his 1963 return respondent asserted as business deductions all amounts paid to Louise and, in addition, all the expenses Louise listed. This necessarily resulted in a double deduction for all ranch expenditures in 1963. Moreover, some of these expenditures were for repayment of loans and for other personal items that did not qualify as income tax deductions. In his 1964 and 1965 returns respondent similarly included nondeductible amounts among the ranch figures that were deducted.

The aggregate amount of improper deductions taken by respondent for the three taxable years exceeded $45,000. He enjoyed aggregate gross income for those years of about $70,000.

The incorrectness of the returns as filed for the three years was not disputed at trial. Transcript of Trial, 869–872, 1148. Neither is it disputed here. Brief for Respondent 4.

III

Section 7206 (1), the felony statute, is violated when one "[w]ilfully makes and subscribes any return," under penalties of perjury, "which he does not believe to be true and correct as to every material matter." Respondent based his defense at trial on the ground that he was not aware of the double deductions asserted in 1963 or of the improper deductions taken in the three taxable years. He claimed that his law office secretary prepared the return schedules from his records and from the information furnished by Louise; he merely failed to check the returns for accuracy.

Respondent requested lesser-included-offense instructions based on the misdemeanor statute, § 7207. This tax misdemeanor is committed by one "who willfully

delivers or discloses" to the Internal Revenue Service any return or document "known by him to be fraudulent or to be false as to any material matter." Respondent argued that the word "willfully" in the misdemeanor statute should be construed to require less scienter than the same word in the felony statute. App. 28. With the state of respondent's guilty knowledge in dispute, his proposed instructions would have allowed the jury to choose between a misdemeanor based on caprice or careless disregard and a felony requiring evil purpose. The trial judge declined to give the requested instructions and, instead, gave an instruction only on the felony, requiring a finding by the jury that the defendant intended "with evil motive or bad purpose either to disobey or to disregard the law." App. 24.

After the guilty verdict on all counts was returned, respondent was sentenced to two years' imprisonment on each count, the sentences to run concurrently. The court, however, suspended all but 90 days of each sentence and placed respondent on probation for five years on condition that he pay a fine of $5,000. App. 31.

IV

The Court of Appeals relied upon and followed, 455 F. 2d, at 614, a series of its own cases,[3] particularly *Adbul* v. *United States*, 254 F. 2d 292 (1958), enunciating the proposition that the word "willfully" has a meaning in tax felony statutes that is more stringent than its meaning in tax misdemeanor statutes.[4] Our examination of

[3] *United States* v. *Haseltine*, 419 F. 2d 579, 581 (1970) (§§ 7201 and 7203); *United States* v. *Fahey*, *supra*, n. 2; *Eustis* v. *United States*, 409 F. 2d 228 (1969) (§ 7203); *Edwards* v. *United States*, 375 F. 2d 862 (1967) (§§ 7201, 7203, and 7206 (2)); *Martin* v. *United States*, *supra*, n. 2; *Abdul* v. *United States*, *supra*, n. 2.

[4] One possible result of this distinction, of course, is that the Government's burden in a misdemeanor case could be less than in a felony case.

these Ninth Circuit precedents in the light of this Court's decisions leads us to conclude that the Court of Appeals' opinion cannot be sustained by this asserted distinction between § 7206 (1) and § 7207.

A. The Ninth Circuit rule appears to have been evolved from language in this Court's opinion in *Spies* v. *United States*, 317 U. S. 492 (1943). In *Spies* the defendant requested an instruction to the effect that an affirmative act was necessary to constitute a willful attempt to evade or defeat a tax, within the meaning of § 145 (b) of the Revenue Act of 1936, 49 Stat. 1648, 1703. The trial court refused the request. The Second Circuit affirmed. This Court reversed. We were concerned in *Spies* with a felony statute, § 145 (b), applying to one "who willfully attempts in any manner to evade or defeat any tax," and with a companion misdemeanor statute, § 145 (a), applying to one who "willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations." These statutes were the predecessors of the current §§ 7201 and 7203, respectively, of the 1954 Code. In distinguishing between the two offenses, the Court said:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not

without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

"Had § 145 (a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of § 145 (b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor, we think, argues strongly against such an interpretation." 317 U. S., at 497–498.

In *Abdul* the court considered an appeal by a taxpayer convicted of tax misdemeanors (§ 2707 (b) of the 1939 Code and § 7203 of the 1954 Code) based on failure to file but acquitted of tax felonies (§ 2707 (c) of the 1939 Code and § 7202 of the 1954 Code) based on failure to account for and pay withholding taxes. The defense was inability to pay. The trial judge instructed the jury that the term "wilful" in the misdemeanor counts meant, among other things, "capriciously or with a careless disregard whether one has the right so to act," whereas the same word in the felony counts meant "with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirma-

tive conduct." 254 F. 2d, at 294. Relying on *Spies*, the Court of Appeals approved these instructions and concluded that

> "the word 'wilful' as used in the misdemeanor statute means something less when applied to a failure to make a return than as applied to a felony non-payment of a tax. This being true, then the words used in the instruction defining 'wilful' as relates to a misdemeanor adequately and clearly point up that difference." *Ibid.*

Because of an error in the cross-examination of Abdul, his conviction was reversed. On retrial, he was again convicted. He appealed, and the judgment was affirmed. *Abdul* v. *United States*, 278 F. 2d 234 (CA9 1960). When Abdul sought certiorari, the Solicitor General conceded that the sentence under one of the counts could not stand and undertook to say that the Government would present to the District Court a motion for correction of the sentence. Certiorari, accordingly, was denied. Two Justices would have granted the writ to review the correctness of the charge "regarding the requirement of willfulness." 364 U. S. 832 (1960).

In the present case the Court of Appeals continued this *Abdul* distinction between willfulness in tax misdemeanor charges and willfulness in tax felony charges. Section 7207, it was said, requires only a showing of "unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed," whereas § 7206 (1) "requires proof of an evil motive and bad faith." 455 F. 2d, at 615. The level of willfulness, thus, would create a disputed factual element that made appropriate a lesser-included-offense instruction.

B. The decisions of this Court do not support the holding in *Abdul*, and implicitly they reject the approach

taken by the Court of Appeals. In *Spies*, the Court speculated, 317 U. S., at 495–498, that Congress could have distinguished between the regulatory aspects of the tax system, that call for compliance regardless of financial status, and the revenue-collecting aspects, that may place demands on a taxpayer he cannot meet. Since the antecedent of § 7203 (as does that section itself today) punished both failure to file and failure to pay as misdemeanors, the Court concluded that Congress had not drawn the line between felonies and misdemeanors on the basis of distinctions between the system's regulatory aspects and its revenue-collecting aspects. The reliance in *Abdul* on that hypothetical statutory scheme, discussed by this Court in *Spies* but found not in line with what Congress had actually done, was misplaced. Utilizing the unsupported *Abdul* distinction as a foundation, the Court of Appeals constructed the further general distinction between tax felonies and tax misdemeanors, a distinction also inconsistent with prior decisions of this Court.

In *Berra* v. *United States*, 351 U. S. 131 (1956), a defendant was convicted of violating the antecedent of § 7201, namely, § 145 (b) of the 1939 Code, a felony statute identical, for present purposes, with the section of the same number in the Revenue Act of 1936 at issue in *Spies*. The defendant claimed that he was entitled to a lesser-included-offense instruction based on § 3616 (a) of the 1939 Code, the antecedent to § 7207. The Court rejected this contention, concluding that the two sections of the 1939 Code then "covered precisely the same ground." 351 U. S., at 134. Implicit in this was the conclusion that the level of intent required for tax misdemeanors was not automatically lower than the level of intent required for tax felonies.

Although the misdemeanor statute, § 3616 (a), proffered by the defendant in *Berra* did not contain the word "willfully," the *Berra* facts were presented to the Court again in *Sansone* v. *United States*, 380 U. S. 343 (1965), when the misdemeanor statutes there in issue, §§ 7207 and 7203 of the 1954 Code, both contained the word "willfully."[5] In *Sansone* the Court rejected the argument that a set of facts could exist that would satisfy the willfulness element in the § 7207 misdemeanor but not in the § 7201 felony:

> "Given petitioner's material misstatement which resulted in a tax deficiency, if, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did for the year 1957, he was guilty of violating both §§ 7201 and 7207. If his action was not willful, he was guilty of violating neither." 380 U. S., at 353.

The same analysis was applied to the requested lesser-included-offense instruction for § 7203. *Id.*, at 352. The clear implication of the decision in *Sansone* is that the word "willfully" possesses the same meaning in §§ 7201, 7203, and 7207. *Sansone* thus foreclosed the argument that the word "willfully" was to be given one meaning in the tax felony statutes and another meaning in the tax misdemeanor statutes.

The thesis relied upon by the Court of Appeals, therefore, was incorrect.

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[5] The applicability of § 3616 (a) of the 1939 Code to income tax returns was not contested in *Berra*, 351 U. S., at 133, but the Court soon held that that statute "did not apply to evasion of the income tax." *Achilli* v. *United States*, 353 U. S. 373, 379 (1957). In *Sansone*, however, statutory revisions effected by the enactment of the 1954 Code were held to make § 7207 applicable to income tax violations. 380 U. S., at 347–349.

V

It would be possible, of course, that the word "willfully" was intended by Congress to have a meaning in § 7206 (1) different from its meaning in § 7207, and we turn now to that possibility.

We continue to recognize that context is important in the quest for the word's meaning. See *United States v. Murdock*, 290 U. S. 389, 394–395 (1933). Here, as in *Spies*, the "legislative history of the section[s] contains nothing helpful on the question here at issue, and we must find the answer from the [sections themselves] and [their] context in the revenue laws." [6] 317 U. S., at 495. We consider first, then, the sections themselves.

A. Respondent argues that both §§ 7206 (1) and 7207 apply to a fraudulent "return" and cover the same ground if the word "willfully" has the same meaning in both sections. Since "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same derelictions it had just defined . . . as a misdemeanor," 317 U. S., at 497, respondent concludes that Congress must have intended to require a more willful violation for the felony than for the misdemeanor.

The critical difficulty for respondent is that the two sections have substantially different express terms. The most obvious difference is that § 7206 (1) applies only if the document "contains or is verified by a written declaration that it is made under the penalties of perjury." No equivalent requirement is present in § 7207. Respondent recognizes this but then relies on the pres-

[6] See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A425 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 602–603 (1954). The predecessor to § 7206 (1) was § 3809 (a) of the 1939 Code. The antecedent to § 7207 was, as we have noted above, § 3616 (a) of the 1939 Code. See *Sansone*, 380 U. S., at 347.

ence of perjury declarations on all federal income tax returns, a fact that effectively equalizes the sections where a federal tax return is at issue. See 26 U. S. C. § 6065 (a).[7]

This approach, however, is not persuasive for two reasons. First, the Secretary or his delegate has the power under § 6065 (a) to provide that no perjury declaration is required. If he does so provide, then § 7207 immediately becomes operative in the area theretofore covered by § 7206 (1). Second, the term "return" is not necessarily limited to a federal income tax return. A state or other nonfederal return could be intended and might not contain a perjury warning. If this type of return were submitted in support of a federal return, or in the course of a tax audit, § 7207 could apply even if § 7206 (1) could not.

There are other distinctions. The felony applies to a document that a taxpayer "[w]illfully makes and subscribes . . . and which he does not believe to be true and correct as to every material matter," whereas the misdemeanor applies to a document that a taxpayer "willfully delivers or discloses to the Secretary or his delegate . . . known by him to be false as to any material matter." In the felony, then, the taxpayer must verify the return or document in writing, and he is liable if he does not affirmatively believe that the material statements are true. For the misdemeanor, however, a document prepared by another could give rise

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[7] "§ 6065. Verification of returns.

"(a) Penalties of perjury.

"Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." See also Treas. Reg. § 1.6065–1 (1972).

to liability on the part of the taxpayer if he delivered or disclosed it to the Service; additional protection is given to the taxpayer in this situation because the document must be known by him to be fraudulent or to be false.

These differences in the respective applications of §§ 7206 (1) and 7207 provide solid evidence that Congress distinguished the statutes in ways that do not turn on the meaning of the word "willfully." Judge Hastie, in analyzing this Court's holding in *Spies*, appropriately described this distinction as follows:

> "However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute . . . and not in the quality of willfulness which characterizes the wrongdoing." *United States* v. *Vitiello*, 363 F. 2d 240, 243 (CA3 1966).

Thus the word "willfully" may have a uniform meaning in the several statutes without rendering any one of them surplusage. We next turn to context.

B. The hierarchy of tax offenses set forth in §§ 7201–7207, inclusive, utilizes the mental state of the offender as a guide in establishing the penalty. Section 7201, relating to attempts to evade or defeat tax, has been described and recognized by the Court as the "climax of this variety of sanctions" and as the "capstone of the system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency." *Spies*, 317 U. S., at 497; *Sansone*, 380 U. S., at 350–351. The actor's mental state is described both by the requirement that acts be done "willfully" and by the designation of certain express elements of the offenses. In § 7201, for example, the Court has held that, by requir-

ing an attempt to evade, "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors." *Spies*, 317 U. S., at 499. Similarly, in § 7207, the Government must show that the document was known by the taxpayer to be fraudulent or to be false as to a material matter.

All these offenses, except two subsections of § 7206 *viz.*, subsections (3) and (4), require that acts be done "willfully." Although the described states of mind might be included in the normal meaning of the word "willfully," the presence of both an express designation and the simultaneous requirement that a violation be committed "willfully" is strong evidence that Congress used the word "willfully" to describe a constant rather than a variable in the tax penalty formula.[8]

The Court, in fact, has recognized that the word "willfully" in these statutes generally connotates a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," *Murdock*, 290 U. S., at 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies*, 317 U. S., at 498,

[8] Semantic confusion sometimes has been created when courts discuss the express requirement of an "attempt to evade" in § 7201 as if it were implicit in the word "willfully" in that statute. This type of analysis produces language suggesting that "willfully" in § 7201 has a different meaning than the same term in § 7203. See *United States* v. *Ming*, 466 F. 2d 1000, 1004 (CA7), cert. denied, 409 U. S. 915 (1972) (§§ 7201 and 7203); *United States* v. *Matosky*, 421 F. 2d 410 (CA7), cert. denied, 398 U. S. 904 (1970) (§ 7203); *United States* v. *Haseltine*, *supra*, 419 F. 2d, at 581; *Edwards* v. *United States*, *supra*, 375 F. 2d, at 867; *United States* v. *Schipani*, 362 F. 2d 825, 831 (CA2), cert. denied, 385 U. S. 934 (1966). This Court may be somewhat responsible for this imprecision because a similar analysis was employed in *Spies*, 317 U. S., at 497–499. Greater clarity might well result from an analysis that distinguishes the express elements, such as an "attempt to evade," prescribed by § 7201, from the uniform requirement of willfulness.

or knowledge that the taxpayer "should have reported more income than he did." *Sansone*, 380 U. S., at 353. See *James* v. *United States*, 366 U. S. 213, 221 (1961); *McCarthy* v. *United States*, 394 U. S. 459, 471 (1969).

This long-standing interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said, "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Spies*, 317 U. S., at 496. Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed "willfully" is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. *James* v. *United States*, *supra*, 366 U. S., at 221–222. Cf. *Lambert* v. *California*, 355 U. S. 225 (1957). The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in *Murdock*, *supra*. We hold, consequently, that the word "willfully" has the same meaning in § 7207 that it has in § 7206 (1). Since the only issue in dispute in this case centered on willfulness, it follows that a conviction of the misdemeanor would clearly support a conviction for the felony.[9] Un-

[9] The Government has argued that the misdemeanor of § 7207 could never be a lesser included offense in § 7206 (1) because the misdemeanor requires that the actor have knowledge of the falsity. This is said to create an additional element in the misdemeanor, not

der these circumstances a lesser-included-offense instruction was not required or proper, for in the federal system it is not the function of the jury to set the penalty. *Berra* v. *United States*, 351 U. S., at 134–135.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

MR. JUSTICE DOUGLAS would affirm the judgment of the Court of Appeals for the Ninth Circuit on the opinion written for that court by Judge Powell. 455 F. 2d 612.

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present in the felony, so the misdemeanor is not "necessarily included" in the felony, within the meaning of Rule 31 (c) of the Federal Rules of Criminal Procedure. Our conclusion that the word "willfully" has the same meaning in both statutes makes it unnecessary to reach this contention.